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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1947.

HUGH HENDERSON, Individually and by J. WILLARD GRAGG, His Next Friend Appointed by the Court, Petitioner,

vs.

SHELL OIL COMPANY, INC.; NATIONAL SURETY CORPORATION; HARTFORD ACCIDENT AND INDEMNITY COMPANY; W. L. MOUNT; CLARA GRAGG; J. L. GRAGG; RUBY BUNTING; FRANK BUNTING; MYRTLE HENDERSON, Individually and as Executrix of the Estate of M. L. HENDERSON, Deceased; RUTH GARRETT; MULDROW GARRETT; GRACE B. OHEIM, Individually and as Executrix of the Estate of A. J. OHEIM, Deceased; MAY KARSTERER, Individually and as Administratrix of the Estate of SYLVESTER KARSTERER, Respondents.

No. 218

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS AND BRIEF AND ARGUMENT IN SUPPORT THEREOF.

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IN THE

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PETITION FOR WRIT OF CERTIORARI

To the Supreme Court of Texas.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Comes now petitioner, Hugh Henderson, individually and by J. Willard Gragg, his next friend, appointed by the Court, and respectfully petitions this Honorable Court to grant a Writ of Certiorari to the Supreme Court of the State of Texas, which is the highest Court of said State having jurisdiction over this case, and to remove therefrom to this Court for review the record in the case lately pending in said Supreme Court of the State of Texas, entitled Hugh Henderson, etc., Petitioner, v. Shell Oil Company, Inc., a Corporation, et al., Respondents, being cause No. A-1330 on the docket of said Supreme Court of the State of Texas.

The duly certified record is filed herewith under separate cover and includes all of the proceedings herein in the District Court of Clay County, Texas, where a certiorari proceeding was filed to review and set aside the proceedings undertaken in the County Court of Clay County, Texas, and in the Court of Civil Appeals for the Second Supreme Judicial District of Texas, to which petitioner appealed the adverse ruling of the District Court of Clay County, and in the Supreme Court of the State of Texas, which granted a writ of certiorari to review the adverse decision of the Court of Civil Appeals for the Second Supreme Judicial District of Texas.

Your petitioner represents that he is aggrieved by the judgment of the Supreme Court of the State of Texas entered in said cause, wherein the said Supreme Court of Texas affirmed the judgment of the trial court and of the Court of Civil Appeals, and thereafter, on the 17th day of March, 1948, denied your petitioner's Petition for a Rehearing of said cause and entered a final judgment affirming the judgment of the trial court.

On application of counsel for petitioner this Court for good cause shown has, on, to-wit, June 7, 1948, ordered that the time for filing Petition for Writ of Certiorari in the above-entitled cause be extended to and including August 14, 1948.

Your petitioner states that the matters at issue in said cause are of peculiar gravity and import, in that a citizen and resident of the State of Missouri has been deprived of his property without due process of law by the decision of the Supreme Court of Texas, which in its final opinion has sustained the validity of a State Statute against the claim that it is repugnant to the Federal Constitution and laws enacted pursuant thereto, and is in conflict with the opinions and holdings of this, the Supreme Court of the United States, and with other State and Federal cases, and is con-

trary to the holdings of the other courts of other states in various jurisdictions, and deprives petitioner of his property without due process of law, contrary to the Fourteenth Amendment to the Constitution of the United States.

SHORT AND SUMMARY STATEMENT OF THE MATTERS INVOLVED.

Petitioner sought in the Courts of Texas to set aside an order of the County Court of Clay County, Texas, made in 1918 purporting to appoint a guardian of his estate in Texas, and to set aside another such order made by the same court in 1939, but which also adjudged him insane, and to set aside the orders of said court pursuant to and by reason of which such guardian purported to lease petitioner's land for the production of oil and gas and to sell one-half of the minerals in petitioner's land in Clay County, Texas, to Respondent, Shell Oil Company, Inc.

Petitioner was a citizen and resident of Missouri (R-2, pp. 33 and 41) and sometime prior to 1918 he inherited the land mentioned (R-2, p. 150).

On November 13, 1918, petitioner's brother, M. L. Henderson, a resident of Texas, filed in the County Court of Clay County, Texas, an application to be appointed guardian of petitioner's estate and alleged therein that petitioner was a resident of Missouri and was not a resident of Texas and was insane (R-2, p. 227; and Plf. Ex. 44, R-3, p. 449). Notice that the application would be heard at the term of the County Court commencing December 2, 1918, was published in a Clay County, Texas, newspaper on November 15, 22, and 29, 1918 (R-2, p. 227; and Plf. Ex. 44, R-3, pp. 450-452). On December 18, 1918, the Court made an order appointing M. L. Henderson guardian of the estate of "Hugh Henderson, Lunatic" (R-2, p. 227; Plf. Ex. 44, R-3, pp. 452-453).

On March 31, 1939, petitioner's brother again filed in the County Court of Clay County, Texas, an application

alleging that petitioner was a resident of Missouri, was not a resident of Texas, was of unsound mind, and prayed to be appointed guardian of petitioner's estate, if it should be found that petitioner was of unsound mind (R-2, p. 227; and Plf. Ex. 44, R-3, p. 587). The Court ordered that notice of the hearing be given in accordance with Article 3310a, Vernon's Revised Civil Statutes, and also that a copy of the application, together with a notice to Hugh Henderson of the date of hearing and requiring him to appear at the time and place thereof be handed to Hugh Henderson personally (R-2, p. 227; Plf. Ex. 44, R-3, p. 588). Notice that the application would be heard on April 17, 1939, was posted on the door of the court house in Clay County, Texas, for ten days (R-2, p. 227; Plf. Ex. 44, R-3, p. 590). A similar notice with a copy of the application was served personally on Hugh Henderson in Pike County, Missouri, on April 5, 1939 (R-2, p. 227; Plf. Ex. 44, R-3, p. 590). On April 17, 1939, the County Court of Clay County, Texas, found petitioner to be of unsound mind and appointed a guardian of his estate (R-2, p. 227; Plf. Ex. 44, R-3, p. 593).

Thereafter the guardian applied for and was granted authority by said Court and pursuant to such authority on May 8, 1939, executed a lease of petitioner's land for oil and gas development and on May 15, 1939, executed a deed and conveyed one-half of the minerals on petitioner's land to Shell Oil Company (R-2, p. 227; and Plf. Ex. 44, R-3, pp. 400, 618 and 648).

No notice other than that mentioned was given in either of the proceedings (R-2, pp. 208-209).

JURISDICTION OF THIS COURT.

The jurisdiction of this court is based upon Section 237 of the Judicial Code, as amended and reformulated by the Act of February 13, 1925, c. 229, sec. 1, 43 Stat. 937, Title 28, U. S. C. A., sec. 347, providing that it shall be compe-

tent for the Supreme Court by Certiorari to require that there be certified to it for review and determination any cause wherein a final judgment or decree has been rendered by the highest court of a state in which a decision could be had where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution of the United States or where any title, right, privilege or immunity is specifically set up or claimed by either party under the Constitution of the United States; and Section 240 of said Judicial Code, which provides that no Writ of Certiorari intended to bring any judgment or decree before the Supreme Court for review shall be allowed or entertained unless application therefor be duly made within three months after the entry of such judgment or decree; provided, that for good cause shown such period may be extended 60 days by a Justice of the Supreme Court.

The judgment of the Supreme Court of Texas sought to be reviewed was rendered February 11, 1948 and became final on March 17, 1948, when Petitioner's motion for rehearing was overruled (R-4, pp. 208 and 229). Justice Black of this court, for good cause shown, on June 7, 1948 extended the time for filing Petition for Writ of Certiorari in this cause to and including August 14, 1948.

The pertinent provisions of the statutes of the State of Texas, the validity of which are involved, summarized, are as follows (from Vernon's Revised Civil Statutes of Texas):

Article 4102. The County Court shall appoint guardians of persons of unsound mind and transact all business pertaining to the estates of persons of unsound mind.

Article 4112. The provisions of this title relating to citations and notice shall be held as specific provisions completely within themselves and no other or further publication, citation, or notice in a newspaper than those provided

for herein shall be required. The provisions of any other law to the contrary notwithstanding.

Article 4113. A proceeding for the appointment of a guardian is begun by written application, filed in the County Court of the county having jurisdiction. Any person may make such application and shall state: (1) The name, sex, age and residence of the minor; (2) The estate of such minor, if any, and the property value thereof; and (3) Such facts as show jurisdiction of the court.

Article 4114. Upon the filing of such application, the clerk shall issue a notice which shall state that an application has been filed for the guardianship of the person or estate, or both, as the case may be, of the minor, naming such minor and by whom filed which such notice shall cite all persons interested in the welfare of such minor to appear at the named term of the court and contest such application if they see proper.

Article 4115. Such notice shall be served by posting a copy thereof at the court house door for not less than ten days before the return day thereof.

Article 28 (Rev. Civil Stat. of Tex., now repealed, but in effect in 1918 from laws of Texas 1917, 35th Legislature, p. 391): That whenever by law notice is required to be given of any act or proceeding whether public or private or relating to a judicial, executive or legislative matter, which notice is now authorized by law or by contract to be made by posting notices in one or more public places, such notice shall be given by publication thereof in a newspaper of general circulation, which has been continuously and regularly published for not less than one year in the county in which said act or proceedings is to occur.

Article 4116. A minor over 14 years of age shall be personally served with citation to appear and answer such application or such minor by writing filed with a clerk

may waive issuance of such citation and make a choice of a guardian.

Article 4123. At a regular term of the court, after notice as required by law, the court may proceed to the appointment of a guardian. Before appointing a guardian, the court must be satisfied (1) that the person for whom the guardian is sought to be appointed is a person of unsound mind; (2) that the court has jurisdiction of the case; (3) that the person to be appointed is qualified and a proper person to be guardian; (4) that the rights of person and property are to be protected; (5) that all issues may be determined by the court unless a jury is demanded, but that it shall not be a prerequisite that there has been a jury trial and a verdict of unsound mind and that the remedy is cumulative of that in chapter 12, Title 69, for guardianship of persons of unsound mind and may be resorted to without reference to the later remedy.

Article 4132. When a non-resident minor or person of unsound mind owns property in this state, guardianship of such estate may be granted when it is made to appear that a necessity exists therefor in like manner as if such minor or person of unsound mind resided in this state. The court making such grant of guardianship shall take all such actions and make all such orders in reference to the estate of the ward for maintenance and support or education of the ward out of the provisions of the estate, the same as if the ward resided in this state and had been sent abroad by order of the court for education and travel.

Article 4274. Each provision of this title relating to guardianship of the person and estates of minors shall apply to the guardianship of the person and estates of persons of unsound mind and habitual drunkards insofar as is the same or applicable.

Article 4285. Where a guardian and ward are non-residents, such guardian may file in the county court where

the ward's estate is located a transcript of a court of competent jurisdiction where he and his ward reside showing he has been appointed guardian of the estate of such ward and upon filing such transcript such guardian shall be entitled to receive letters of guardianship in the estate of such minor or persons of unsound mind or habitual drunkards situated in this state.

The opinions of the Supreme Court of Texas and of the Court of Civil Appeals for the Second Supreme Judicial District of Texas are appended hereto, at pages 39 and 46, respectively.

The Supreme Court of Texas held that the foregoing statutes did not require personal service in a proceeding to determine the insanity of a nonresident who owned land in Texas and that such personal service was not required but that service by publication and posting was all that was necessary to comply with the Fourteenth Amendment to the Constitution of the United States.

On April 24, 1943, Petitioner, by next friend, filed in the District Court of Clay County, Texas, a petition for Writ of Certiorari to the County Court of Clay County, Texas (R-1, p. 5), alleging that the proceeding in and orders of the County Court heretofore mentioned "deprived him of his property without due process of law * * * under the constitution * * * of the United States of America * * * particularly under the Fifth and Fourteenth Amendments of said Constitution of the United States of America," and for this reason Petitioner sought to have the order canceled and held for naught (R-1, pp. 21-22). The contention was reiterated by Petitioner in his Third Amended Petition for Writ of Certiorari filed in the District Court of Clay County, Texas, on which the case was tried (R-1, pp. 152-154 and 159-162), but was ignored by the District Court in its judgment (R-1, p. 393).

By assignment of error the same contention was presented to the Court of Civil Appeals of the Second Supreme Judicial District of Texas (R-5, pp. 9-13), but was overruled by that court in its opinion (R-4, p. 1). The contention was again presented to that court by motion for rehearing (R-4, pp. 24-26) and was overruled (R-4, p. 34).

By assignment of error in the Petition for Writ of Error, the same contention was presented to the Supreme Court of Texas (R-4, p. 46), and was ruled adversely to petitioner by that court, which held as follows:

> "Article 4116, R. C. S., provides that a minor, fourteen years of age or over, shall be personally served with citation to appear and answer an application for the appointment of a guardian of him or of his estate. Article 4274 provides that each provision in the title relating to guardianships of persons and estates of minors shall apply to guardianships of persons of unsound mind 'in so far as the same are applicable.' Petitioner takes the position that the Article last cited makes the Article first cited applicable to guardianship proceedings for insane persons. We are not in agreement with this view. Article 4116 is grounded upon the presumption that by the time the minor reaches the age of fourteen years he will have acquired some discretion and be capable of making a choice of guardian. No such presumption obtains in the case of a person of unsound mind. His discretion does not grow with the years. Article 4116 is, therefore, not applicable to him.
>
> "It was held in Storey v. Storey (Civ. App.), 105 S. W. (2d) 370 (writ of error refused), that personal service of citation on a person of unsound mind was ineffective to confer jurisdiction on a county court to appoint a guardian for such a person, and that notice by posting provided by Articles 4114 and 4115 was mandatory. That requirement was met in this case.

Prior to 1941 (47th Leg., p. 867, ch. 541) there was no statute in Texas authorizing nonresident notice in a guardianship proceeding for a person of unsound mind. Our conclusion is that the Court of Civil Appeals correctly decided that the County Court of Clay County was acting within its jurisdiction in making the appointment of M. L. Henderson as guardian of the estate of Hugh Henderson in 1939.

"It is our further view that due process within the meaning of the Fourteenth Amendment to the Constitution of the United States was observed in the proceeding. Jones v. Prairie Oil Co., 273 U. S. 195; McKinley v. Salter (Civ. App.), 136 S. W. 2d 615 (writ dismissed, correct judgment). Such a proceeding is one in rem or quasi in rem. McCormick v. Blaine, 178 N. E. 195, 77 A. L. R. 1215; Re Sall, 59 Wash. 539, 140 Am. St. Rep. 885; Wallace v. Tinney (Iowa), 122 N. W. 936. In a proceeding of that nature the court may acquire jurisdiction by means of substituted or constructive service. Pennoyer v. Neff, 95 U. S. 714; Re Sall, supra; Case note 77 A. L. R. 1227. A contrary holding would have the effect of depriving the courts of this state of control over lands situated within its borders" (R-4, p. 203).

The contention was reasserted by motion for rehearing in the Supreme Court of Texas (R-4, p. 222), and was overruled (R-4, p. 229).

This Court has not previously determined the kind of service required in a proceeding to determine the sanity of a person and particularly where the person is a nonresident of the state.

The cases believed to sustain the jurisdiction of this court are the following:

Pennoyer v. Neff, 95 U. S. 714, 24 L. Ed. 565;
Minnesota v. Probate Court, 309 U. S. 271;

Boston & Maine v. Armburg, 285 U. S. 232, 52 S. Ct. 336, 76 L. Ed. 729;
Union Bank v. Phelps, 288 U. S. 181, 53 S. Ct. 321, 77 L. Ed. 687, 83 A. L. R. 1438;
Griffin v. Griffin, 66 S. Ct. 556, 327 U. S. 220;
International Shoe Co. v. State of Washington, 66 S. Ct. 154, 326 U. S. 310;
Wuchter v. Puzzutti, 276 U. S. 13, 48 S. Ct. 259;
Hess v. Pawloski, 47 S. Ct. 632, 274 U. S. 352;
McDonald v. Maybee, 243 U. S. 90, 37 S. Ct. 343, 61 L. Ed. 608;
Jacob v. Roberts, 223 U. S. 261, 32 S. Ct. 303, 56 L. Ed. 429.

QUESTIONS PRESENTED.

The questions presented are:

A. Whether the State of Texas may, consistently with the Fourteenth Amendment of the Constitution of the United States, determine the sanity of a citizen and resident of another state who owns property in Texas, and upon a finding that such person is insane, appoint a guardian of the estate of such person and authorize such guardian to dispose of the property of such nonresident in the State of Texas; and

B. Whether, if the State of Texas has such power as mentioned in the preceding paragraph, it may be exercised, consistently with the Fourteenth Amendment of the Constitution of the United States when the statutes of the State of Texas do not provide for or require personal service of process on the alleged insane person and when such notice was not in fact given.

C. If the State of Texas has such power as mentioned in paragraph A and personal service is not required for the exercise thereof, whether service by publication or posting of notices in Texas is sufficient to comply with the Fourteenth Amendment of the Constitution of the United States.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

Certiorari should be granted for the following reasons:

First: The Supreme Court of the State of Texas has denied a resident and citizen of Missouri due process of law by holding that a citizen and resident of Missouri can be served by publication and posting in Texas alone in a proceeding to determine his sanity.

Second: In the interest of uniformity of interpretation between this Court and the said Supreme Court of the State of Texas and because of substantial conflict of decision on a vital and controlling matter of law involved in this cause in regard to the construction and application of the Constitution of the United States and its amendments.

Third: Because there is a conflict in decision between the said Supreme Court of the State of Texas and the decisions of the various Federal Circuit Courts of Appeal and the decisions of the various Supreme Courts of the several states of the Union on a controlling and decisive question of law involved in this case in regard to the construction and application of the Constitution of the United States and the Fourteenth Amendment thereof.

Fourth: Because the decision of the Supreme Court of the State of Texas upholds the validity of a state statute purportedly authorizing service by publication to determine the sanity of a resident and citizen of a foreign state, in violation of the due process clause of the United States Constitution and its amendments.

Fifth: This court has not heretofore determined the question of due process in sanity proceedings as in this case and the Supreme Court of Texas has decided an important Federal question in a way not in accord with

applicable decisions of this Court, in that the Supreme Court of Texas rules that the jurisdiction of the state over land in the state authorizes the determination of the mental capacity of the non-resident owner of such land without personal service, and thus permits a personal judgment upon constructive service, contrary to Pennoyer v. Neff, 95 U. S. 714.

Sixth: This erroneous ruling may be extended and applied to the determination of other questions affecting the right and capacity to transfer land such as the validity of a marriage, or the legitimacy of children.

Seventh: If the decision of the Supreme Court of Texas be allowed to stand the sanity of a non-resident landowner may be determined upon published or posted notice and will create serious questions of the full faith and credit to be given a judgment regarding the sanity of such a non-resident property owner.

Eighth: Your petitioner further shows that the Supreme Court of Texas had the above points brought to its attention, but disregarded them, and the same were again called to the attention of the Texas Supreme Court in your Petitioner's Motion for Rehearing, which said Motion said Court overruled.

Wherefore, your Petitioner prays that a Writ of Certiorari be issued to the Supreme Court of Texas commanding said court to certify and send to this court a full and complete transcript of the record and the proceedings of the Supreme Court of Texas in the case on its Docket No. A-1330, entitled Hugh Henderson, through J. Willard Gragg, his next friend, Petitioner, v. Shell Oil Company, Inc., et al., Respondents, to the end that the case may be reviewed and determined by this court as provided for by the statutes of the United States, and that the judgment of said Supreme Court of Texas be reversed, and that Peti-

tioner have such other relief as to this court may seem appropriate.

Respectfully submitted,

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No.....

BRIEF AND ARGUMENT

In Support of Petition for Writ of Certiorari.

OPINION OF THE COURT BELOW.

The opinion of the Supreme Court of Texas which is reported in ... Tex. ..., 208 S. W. 2nd 863, and the opinion of the Court of Civil Appeals for the Second Supreme Judicial District of Texas which is reported in 202 S. W. 2d 492, are appended hereto.

STATEMENT OF THE GROUNDS ON WHICH JURISDICTION OF THIS COURT IS INVOKED.

The statement of the grounds on which the jurisdiction of this court is invoked is contained in the Petition for Writ of Certiorari, and is incorporated here by reference.

STATEMENT OF THE CASE.

The statement of the case in the Petition for Writ of Certiorari, ante, is adopted here by reference.

SPECIFICATION OF ERRORS.

A. The Supreme Court of Texas erred in holding that the State of Texas had the right, consistently with the Fourteenth Amendment of the Constitution of the United States, to inquire into and determine the sanity of a nonresident of the State of Texas.

B. The Supreme Court of Texas erred in holding that the State of Texas could consistently with the Fourteenth Amendment of the Constitution of the United States, inquire into and determine the sanity of a nonresident of the state who owned property within the state upon published or posted notice and without the seizure of property or personal service of process.

C. The Supreme Court of Texas erred in holding that the statutes of the State of Texas do not violate the Fourteenth Amendment of the Constitution of the United States by authorizing an inquiry into and determination of the sanity of a nonresident property owner without personal service of process.

D. The Supreme Court of Texas erred in holding that the proceedings in the County Court of Clay County, Texas, to determine Petitioner's sanity and upon a finding that Petitioner was insane to appoint a guardian for him were proceedings in rem maintainable upon constructive service and not proceedings in personam, requiring personal service of process in order to comply with the Fourteenth Amendment of the Constitution of the United States.

ARGUMENT.

The Texas Court's holding is that a Texas County Court **merely upon a notice published in a local paper or posted upon the courthouse door** may proceed to adjudge insane any owner of property located in the county, **even a resident of another state.**

To reach such conclusion the Court holds that **Article 4116 requiring personal service of citation** does not apply to a proceeding based upon allegations of **insanity,** as such proceeding is in rem.

The question of whether or not the Texas Legislature **could** have authorized service by non-resident **notice,** service by mail, or other substituted service, is not involved, because the Legislature **had not** authorized any such service.

The Texas Supreme Court took the position that Article 4116 requiring personal service of citation did not apply to a proceeding based on allegations of **insanity,** but only to those applications based on **minority.** It asserts that the posting required by Article 4115 is the **only notice** "required by law" in order to adjudicate a man insane and divest him of control of his property, whether he be a resident of Texas or Missouri. If this basic premise is invalid, then the whole argument fails.

The opinion below cites Jones v. Prairie Oil & Gas Co., 273 U. S. 195, 47 S. Ct. 338, as authority for the proposition that due process within the meaning of the Fourteenth Amendment to the Constitution of the United States was observed in this proceeding. But that case involved the appointment of a guardian of an admitted minor, who and whose property were all within the state of Oklahoma, and notice was in fact given by posting and by mail to the

minor, and others having care of the minor, all in compliance with the order of the Court in accordance with the statute. That case did not involve the rights of a non-resident adult.

In the same connection the court also cites, but does not analyze, Pennoyer v. Neff. This case is directly contrary to the position taken by the court below.

This court in **Pennoyer v. Neff, 95 U. S. 714**, announced the rules which govern this case, but which rules the Supreme Court of Texas has not followed. The facts of this case and the facts in Pennoyer v. Neff are substantially the same. In Pennoyer v. Neff an Oregon statute provided for service by publication in suits against non-residents who owned property in Oregon. Neff was not a resident of Oregon but owned property there. He was sued by one Mitchell for an alleged debt and service was obtained on him by publication, **but his Oregon property was not seized before judgment in the case.** After a judgment against Neff, his Oregon property was seized and sold on execution to Pennoyer. This court held the judgment and the consequent sale to be void. So in this case, Henderson owned land in Texas, but was not a resident of Texas. Service in the guardianship proceedings was only by publication and posting. **None of his property was seized before a guardian was purportedly appointed.** The guardianship proceeding in Texas was no more against land than the suit against Neff in Oregon. The guardianship proceeding was against Hugh Henderson. Seizure of his land was an aftermath of the finding that he was of unsound mind and followed the appointment of a guardian based on the finding of unsound mind. The Texas statute did not authorize the appointment of a guardian at all until after it had been established that Hugh Henderson was of unsound mind. Although both of those things could (in a proper case) be done in the

same proceeding. Article 4123, Vernon's Revised Civil Statutes of Texas, provided in part that:

> "* * * after notice as required by law, the court may proceed to the appointment of a guardian. Before appointing a guardian, the court must be satisfied (1) that the person for whom a guardian is sought is * * * a person of unsound mind * * *."

The determination of Hugh Henderson's sanity was as much an object of each of the guardianship proceedings as was the ultimate control of Hugh Henderson's property by a guardian. A finding that Hugh Henderson was of unsound mind was the first and primary purpose of each of those proceedings, for without it the court had no authority to appoint a guardian. This court has long ago recognized that "merely giving a name to an action as concerning the thing rather than personal rights in it" will not justify depriving a person of his property without due process of law. **Leigh v. Green, 193 U. S. 79, 24 Sup. Ct. 39.**

The Texas courts may not satisfy the requirements of the Fourteenth Amendment of the Constitution of the United States by calling the guardianship proceedings "in rem" or "quasi in rem" or by saying that their primary object was the control of Texas property and not the determination of Hugh Henderson's sanity. The decision of the Supreme Court of Texas is directly contrary to the decision in Pennoyer v. Neff. The Supreme Court of Texas in this case holds directly contrary thereto, and holds that ownership of land in a state and service by publication, but without seizure of property, constitutes a valid basis for a personal judgment. Since Pennoyer v. Neff, it cannot be the rule in any state consistently with the Fourteenth Amendment of the Constitution of the United States.

Prior to the opinion herein the courts in Texas had held with Pennoyer v. Neff. Redmon v. Leach, 130 S. W. (2d) 873 (Civ. App., Dallas), is factually the same as this case. It was expressly approved by the Supreme Court of Texas, which dismissed a Writ of Error "correct judgment." We trust this Court will pardon a rather lengthy reference to that case, as it so fully presents the question of due process under the applicable Texas law. In that case the Dallas Court of Civil Appeals held:

> "We think it obvious that, before the power to appoint a guardian of property in this state, belonging to a non-resident minor or person of unsound mind, could be exercised, necessarily the court would have to first determine the status of such person, that is, whether of minority or unsoundness of mind, as the case might be; otherwise, the power to appoint would be wholly lacking. So, we are plainly confronted with the question, whether the court below had the power to determine that Beatrice Redmon, a citizen of and domiciled in the State of Oklahoma, was a person of unsound mind * * *.
>
> "We conclude, therefore, that in view of the doctrine announced in the authorities cited, where, as in the instant case, the appointment of a guardian involves the necessity for the court making the appointment, to first adjudicate and determine the status, whether of minority or of unsoundness of mind, of a non-resident, for whose estate a guardian is sought, the court not only is without jurisdiction, but that, any attempt of the legislature to confer such jurisdiction would be ineffective; to say otherwise would be to ignore the doctrine announced by Judge Taney, and other authorities cited, to the effect that, 'Every state has an undoubted right to determine the status, or domestic and social condition, of the persons domiciled within its territory.' But, aside from the want

of power in the court below, to appoint a guardian of the estate of the non-resident, based upon an adjudication as to her status, we are of opinion that, the court was without jurisdiction, for the want of personal service of citation upon the non-resident * * *.

"In Bearden v. Texas Company, 60 S. W. 2d 1031, 1034, construing these statutes together, the Supreme Court said: 'It appears that when Articles 4114, 4115 and 4116, are read in conjunction with Article 4274, supra, the method of issuing and serving notice in guardianship proceedings for the appointment of a guardian for persons of non compos mentis are fully defined. In other words, Article 4274 requires that notice and citation shall be issued in cases involving insanity in the same manner as in cases involving minors.' It follows, therefore, that, as Beatrice Redmon was over 14 years of age, she should have been served personally with citation. But it may be said that, being of unsound mind, personal service of citation could serve no useful purpose. It must be borne in mind that, she was presumed to be sane, as the only imputation against her sanity was the unsupported allegation. The rule is that, until overcome by proof, the presumption will be indulged that, a person is mentally sound, possesses ordinary intelligence, judgment and discretion, and is competent to transact ordinary business. Therefore, in the absence of personal service, we conclude that the court below was without jurisdiction and that its order appointing the guardian, and all proceedings had thereunder, are void."

Other states and the District of Columbia take the view that a proceeding to determine a person's sanity and for the appointment of a guardian, if the person is found to be insane, is in personam and requires personal service on the alleged insane person.

In **Raher v. Raher, 150 Ia. 511, 129 N. W. 94,** it appears:

> "Appeal by plaintiff from a judgment of the District Court for Iowa County in defendants' favor in an action brought to set aside a judgment adjudging plaintiff to be of unsound mind, and appointing defendant Mullin guardian over his person and property.
>
> • • • • • • •
>
> "The special proceeding in which this plaintiff was adjudged to be of unsound mind and Mullin was appointed guardian was instituted in the District Court of Iowa County, and personal service was made upon this plaintiff while he was in fact within the limits of the state of South Dakota. The petition in such proceeding did not allege the place of residence of the defendant therein, but it is now stipulated that his legal residence was in Iowa County . . ."

After discussing state statutes, the Court continues:

> ". . . It is therefore quite apparent that what the legislature in adopting the Civil Code of 1860 attempted to do was to authorize some kind of a judgment alike against residents and non-residents on personal service out of the state, without the preliminary seizure of any property which would give the court jurisdiction in rem, and the question we have to determine is whether such a judgment is of any validity within the state.
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> • • • • • • •
>
> "It may be conceded that expressions of opinion are found in decided cases and in textbooks justifying the view evidently entertained by the legislature, as above indicated. This view is contrary to the general proposition that the laws of a state, especially a state of this Union, are territorial rather than personal in their force and application. Romano v. Capital City

Brick & Pipe Co., 125 Iowa 591, 68 L. R. A. 132, 106 Am. St. Rep. 323, 101 N. W. 437, 2 A. & E. Ann. Cas. 678. And it violated the provision of our own Constitution and of the 14th Amendment of the Federal Constitution, that no person shall be deprived of his property without the process of law.

* * * * * * *

"After examining all the cases which we have been able to find bearing directly or remotely on the question, we reach the conclusion that no court of last resort in any of the states of the Union has upheld such a judgment as against an attack based on the want of authority of the state to authorize such a judgment, or the want of authority of the court to render it . . ."

The Court then discusses numerous cases and concludes:

". . . We have now no hesitation, however, in announcing our conclusion that a state cannot, by providing for personal service outside of its territorial limits, authorize its courts to render personal judgment against a defendant thus served. **The judgment in the proceedings for the appointment of a guardian of the property of this plaintiff, predicated upon service of notice upon him in South Dakota, was therefore void, and the trial court erred in not so holding.**"

In **Grinbaum v. Superior Court, 192 Cal. 566, 221 P. 635, l. c. 646,** it is said:

"The strictitude of our statutory requirements in that regard is best illustrated by the provisions of Sec. 1763 of the Code of Civil Procedure relating to the guardianship over the person or property of alleged insane or incompetent persons who are within the state which require personal service and attend-

ance of the alleged insane or incompetent person if possible. That a similar strictitude cannot be practicably enforced in the case of alleged insane or incompetent persons who reside or are absent from the state lies in the nature of things but does not in any degree diminish the importance of giving the notice required by Sec. 1793 of the Code of Civil Procedure. Said notice requirement rests upon the fundamental doctrine that no person can be deprived of life, liberty or property without due process of law."

The Supreme Court of California has followed this earlier case in two very late cases and held that an insanity hearing based on foreign service and on publication service are insufficient and the entire proceedings are null and void because of lack of personal service.

In re: Allie Walters Sacks (Cal.), 190 P. (2d) 602,
and
Sacks v. Superior Court, 79 Cal. App. (2d) .., 180 P. 2d 922.

The Court of Appeals for the District of Columbia in **Cooper v. Burton, 127 Fed. (2d) 741,** said:

"In October, 1940, P. Gordon Cooper and Albin Cooper (appellants), sons of Emma K. Cooper, filed a petition in the District Court to have the mental competency of Mrs. Cooper determined, and, upon a finding that she was insane, to have appointed a committee of her property and estate. The petition prayed that during the pendency of the cause a conservator of the property be appointed.

"Mrs. Cooper is a widow eighty years of age. From 1914 to 1934 she resided with her sons in Washington, D. C. In 1932 she is alleged to have become insane, and in 1934 she was taken to the Christian Sanatorium, Bergen County, New Jersey, for care and treatment.

She has remained there ever since and is there now. The bulk of her estate consists of an inheritance from her sister, who resided in New York. In April, 1940, the Chancery Court of New Jersey adjudicated Mrs. Cooper to be of unsound mind, and the Orphans' Court of Bergen County, New Jersey, thereupon appointed Lloyd L. Schroeder (appellee) guardian and committee of her estate.

"After the filing of the petition in this case, a subpoena issued and was returned by the marshal 'not to be found.' Thereafter the district court, at the instance of appellants, ordered substituted service by publication. Copies were mailed to Mrs. Cooper and to the superintendent of the sanatorium in New Jersey. Following this, the New Jersey guardian, appearing specially, moved the court to vacate the order of publication and dismiss the petition because of lack of jurisdiction. . . .

". . . We have been referred to no statute which empowers the United States District Court for the District of Columbia to adjudicate the mental condition of a lunatic in New Jersey because she formerly lived in the District. Doubtless it is true that the courts of the District have power to grant protection to property of insane persons, wherever they may be at a particular time, if the property itself is located in the District of Columbia, but protection of property is not the object of this petition. Appellants are not interested in obtaining the appointment of a receiver or custodian of the small amount of Mrs. Cooper's property in the District of Columbia. They are seeking an adjudication of insanity and the appointment of a committee for the purpose of controlling properties located in New York, and this character of relief the courts of the District may not grant in the absence of personal service in the District of Columbia.

"In this view, we need say nothing on the subject of the full faith and credit rule as applicable to the New Jersey decree.

"Affirmed.

"On petition for Rehearing and Clarification of Opinion.

"Per Curiam.

"Appellants have asked for a rehearing or a clarification of the opinion filed March 23, 1942. The particular paragraph to which our attention is drawn, and which we are asked to clarify, is as follows: 'Doubtless it is true that the courts of the district have power to grant protection to property of insane persons, wherever they may be at a particular time, if the property itself is located in the District of Columbia, but protection of property is not the object of this petition. Appellants are not interested in obtaining the appointment of a receiver or custodian of the small amount of Mrs. Cooper's property in the District of Columbia. They are seeking an adjudication of insanity and the appointment of a committee for the purpose of controlling properties located in New York, and this character of relief the courts of the district may not grant in the absence of personal service in the District of Columbia.'

"Appellants state that it is incorrect to say that they are not interested in obtaining the appointment of a receiver or custodian of Mrs. Cooper's property in the District of Columbia, and insist that they are. If this is true, nothing in the opinion forecloses any right they may have in that respect. We did not decide, nor did appellants ask us to decide, whether a receiver or custodian to care for property within the District could be appointed without an adjudication of insanity. The petition below prayed that a 'hearing be had to determine the mental competency of Emma K.

Cooper and should she be found to be non compos mentis that (appellants) be appointed domiciliary committee of the estate of said Emma K. Cooper.' **Our opinion holds that a general or domiciliary committee cannot be appointed without an adjudication of insanity** and that **there cannot be an adjudication of insanity in the absence of personal jurisdiction over the alleged insane person.**

"Rehearing denied."

The Federal Circuit Court of Appeals for the Tenth Circuit, in the case of **McElroy v. Pegg, 167 Fed. (2d) 668,** held that where notice was not personally served on an alleged incompetent as required by state statute, the order appointing a guardian was **void.** The court reviews the facts and at page 670 says:

"In the case of **In re Mize's Guardianship, 193 Okl. 164, 142 P. 2d 116,** an order had been made appointing a guardian for Elnora Mize, an alleged incompetent. The record did not disclose that **personal service was made** upon Elnora Mize. She personally appeared at the hearing on the petition for the appointment of the guardian and had joined in such petition. The **court held** that Sec. 851, supra, **required** that **notice** of the time and place of the hearing **shall be served personally upon** the alleged incompetent not less than five days before the time appointed for the hearing, **that failure to personally serve notice was not cured by the personal appearance of the alleged incompetent** at the hearing, and that the order of appointment was void. In **Martin v. O'Reilly, 81 Okl. 261, 200 P. 687,** the court held that the requirement that notice of the hearing on the application for the appointment of a guardian be **personally served** upon the alleged incompetent was **jurisdictional,** and that an order appointing a guardian, where no personal service was made upon

the alleged incompetent, was **void and subject to collateral attack.** In **Colby v. Jacobs, 179 Okl. 170, 64 P. 2d 881,** the court held that the requirement that notice of the hearing on the application be **personally served** upon the alleged incompetent was **jurisdictional** and, **without the service of such notice,** the **court acquired no jurisdiction** to make an adjudication of incompetency or to appoint a guardian.

"Here, there was was **no showing of personal service** upon Harjo and it was a reasonable inference from the recitals in the order of appointment that notice was not personally served upon Harjo. Moreover, the order of appointment did not find or adjudge the statutory grounds for the appointment of the guardian.

"**It follows that the order appointing a guardian for Harjo was void** and created no presumption of the incompetency of Harjo." (Emphasis ours.)

In **Martin v. White, 146 Fed. 461,** the Ninth Circuit Court of Appeals said:

"Petition for guardianship in Alaska alleged H. M. Badger a legal resident of Alaska, had left Alaska; that he was insane and had property in Alaska. Citation was published and guardian appointed. Appointment was held void on collateral attack.

"Code Alaska, Sec. 911, declares that when any person likely to be put under guardianship shall reside without the district, and shall have any estate therein, any friend or anyone interested in his estate may apply to the commissioner of any precinct in which any such estate may be, and that a guardian may be appointed by the commissioner after notice. Sec. 912 declares that every guardian appointed under the provisions of the preceding section shall have the same powers and duties with respect to any estate of the ward that may be found within the district, etc, as are

given to any other guardian duly appointed, etc. **Held**, that such sections were only applicable to guardians appointed for persons who reside without the district, having estates within the district where the proceedings are instituted.

"Code Alaska, Sec. 896, declaring that when the relatives or friends of any insane person shall apply to have a guardian appointed for him, the commissioner shall cause notice to be given to the supposed insane person of the time and place of the hearing, etc., contemplates the personal service of such notice on the person affected thereby."

And some states hold actual residence also to be required.

In **Morrissey v. Rodgers, 137 Kan. 626, 21 P. 2nd 359**, the Supreme Court of Kansas says:

"This is a proceeding in mandamus brought in the district court of Mitchell County, Kan., by a resident of Nebraska, as guardian of an incompetent person, appointed as such by the county court of Lancaster County, Neb., against the probate judge of Mitchell County, Kan., to compel him to issue a certificate of guardianship to the plaintiff and to direct the payment to him of the proceeds of two estates administered in the probate court of Mitchell County, in which the incompetent had already been found to be the sole heir.

"An alternative writ was issued, and a motion of the probate judge to quash it was overruled. Defendant then filed an answer admitting the filing in the probate court of an authenticated copy of the appointment and qualification of the plaintiff by the court of Lancaster County, Neb., and an application for a certificate of guardianship from the probate

court, and for authority to receive the money and property belonging to the incompetent from these estates, but denying that the incompetent, George Eberle, was or ever has been a resident of Nebraska, and the answer alleged he has continuously for the past fifty-three years been a resident of Mitchell County, Kan., and further that, because of his incompetency for more than a year past, he had been unable mentally to make or effect a legal change of residence. The plaintiff moved for judgment on the pleadings. Pending the consideration of this motion, the defendant offered evidence to show that the incompetent, George Eberle, was not a resident of Nebraska, but was and had been for many years past a resident of Mitchell County, Kansas. . . ."

And in **Beeler v. Beezley, 126 Kan. 268, 267 Pac. 1112,** it also appears:

"The action was one of prohibition to restrain the probate judge of Edwards County from conducting a proceeding to determine the mental competency of a person not within the county. The relief prayed for was granted, and the probate judge appeals.

"Gracia Beeler, daughter of H. B. Beeler, filed an information in the probate court of Edwards County, alleging that H. B. Beeler was a resident of Edwards County and a person of unsound mind, who was incapable of managing his affairs; that he was in an institution in Kansas City, Mo., for treatment of mental diseases, and was there undergoing treatment for his malady; that he was incapable of caring for himself; and that he had real and personal property in Edwards and Reno Counties which ought to be placed in the custody and under the control of a guardian. The Court issued a notice to Beeler of a

hearing on the information, appointed Gracia Beeler to serve the notice, and the notice was served on Beeler in Missouri. On the day designated for the hearing, an attorney for Beeler appeared specially, and challenged jurisdiction of the court. The challenge was overruled, and a jury was called and sworn to inquire respecting Beeler's sanity. Before the inquiry was concluded an alternative writ of prohibition was served on the probate judge. The probate judge answered, a demurrer to the answer was sustained, and a writ prohibiting the probate judge from proceeding further was issued."

"The brief for the probate judge discusses the nature of the proceeding, whether civil or criminal, adversary or parental, and the subjects of notice and service of notice. We do not get to any of those matters, because **the information disclosed that Beeler was in Missouri, and the probate court had no jurisdiction to entertain it.** There is no jurisdiction to make an initial inquiry into the sanity of a person outside the county in a guardianship proceeding, and the same is true of proceedings for institutional restraint."

And in **Hansell v. Hansell, 44 La. A. 475, 10 S. 941,** the Louisiana Court says:

"Plaintiffs Emma W. Hansell et al., being the owners of an undivided twenty-nine thirtieths of certain improved real estate in the First Ward of the City of New Orleans, on Magazine and Common Streets, bring this suit for a partition against Henry H. Hansell, the owner of the remaining undivided one-thirtieth interest. The petition alleges the ownership, and that Henry H. Hansell is a notoriously insane person, who has never been interdicted, and for whom

no curator has ever been appointed; that he is confined in an asylum in the city of Philadelphia, Pa., and it is necessary that a special curator and curator ad hoc be appointed to represent him, and defend the suit; that F. F. Hansell, of the full age of majority, is the brother of H. H. Hansell, and is the person who, under the law, would be appointed curator to said H. H. Hansell in case he were to be interdicted. The prayer is that said F. F. Hansell be appointed special curator and curator ad hoc to represent said H. H. Hansell; that he be notified of his appointment, and duly cited to answer the petition; and that there be judgment ordering the property sold at public auction, as provided by law. In accordance with the prayer of the petition, F. F. Hansell was appointed special curator and curator ad hoc of Henry H. Hansell, and was duly notified and served with citation to answer in due course. The judgment was regularly rendered, in accordance with the prayer of the petition, ordering a sale of the property at public auction. The sale was made, and the properties were adjudicated, one to R. Maitre and the other to R. F. W. Bachman, who refused to take title for various reasons stated in their answer to the rule taken by plaintiffs on them to compel them to comply with the adjudication. The principal objection made by the adjudicatees, and the one upon which they insist most strongly, is that until H. H. Hansell has been interdicted, and a curator appointed for him, as provided by law, he cannot be properly brought into court, and a binding judgment rendered against him; (2) they object on the ground that F. F. Hansell has never taken oath as special curator, and therefore H. H. Hansell was not properly represented, and the judgment rendered against him not a valid and binding one.

"It is alleged in the petition that H. H. Hansell is notoriously insane, and this averment is proved by the testimony. He has been in this condition for three years, and during that time has been confined in an insane asylum in the city of Philadelphia. His domicile is in that city. The courts in this state have no jurisdiction of his person, and can render no decree affecting his personal status, and interdict him. The courts of his domicile alone have jurisdiction to ascertain his mental condition, and to render the necessary decree relieving him of the control both of his person and estate. No facts alleged and no evidence received by the courts here can place a person domiciled in a foreign jurisdiction among the class of persons incapable of managing their persons and estates. . . ."

In **McMullin v. Commonwealth, etc., 261 Pa. 574, 104 Atlantic 760**, Harry Kern, a resident of New Jersey, was adjudged insane in that state. Afterward a Pennsylvania court appointed guardian for his property in Pennsylvania. The guardian appointed in New Jersey sought an order of the Pennsylvania court permitting the removal to New Jersey of property in Pennsylvania belonging to the ward under the provisions of the Pennsylvania statute authorizing a non-resident guardian of a non-resident ward to remove property. The lower court denied the petition and the Supreme Court of Pennsylvania said:

"We simply remark, without further comment, that the learned court was here under misapprehension as to its proper functions in this particular case; the lunatic here was not its ward; it had not adjudged him a lunatic, **and could not have done so, had it attempted to, inasmuch as it had no jurisdiction over him, he being resident of another state.** He was the ward of a court in another state, and that court alone had juris-

diction over his person. It was by virtue of the adjudication of that court that he was legally adjudged a lunatic, and it was upon the certification of that court to the courts of this state that the latter acquired custody and control of the lunatic's property lying within this state."

But there are cases in which it was conceded by one party that jurisdiction to appoint a guardian of an estate might rest on a different basis than a proceeding for the appointment of a guardian of the person, although both proceedings require an adjudication of insanity, such as McCormack v. Blaine, ... Ill. ..., 178 N. E. 195. And there are cases which hold that there is a difference in the service required where the guardianship is to conserve and not for the disposition of property, such as in Re Ryan, 40 N. Y. S. (2d) 592, and in Re Sall, ... Wash. ..., 110 Pac. 32.

And there are cases such as Wallace v. Tinney, ... Iowa ..., 122 N. W. 936, which is at variance with later decisions in the same state such as Raher v. Raher, ... Iowa ..., 129 N. W. 94.

As said in 77 A. L. R. 1228, "there is comparatively little authority as to the general or constitutional validity of proceedings to have a person declared insane and to appoint a guardian or committee of his person or property based on constructive or substituted service of process." And it is further apparent from the foregoing and from the annotations in 23 A. L. R. 594 and 126 A. L. R. 671 that there is no uniformity as to the notice required by the courts in proceedings to determine sanity and for the appointment of a guardian.

An adjudication of insanity effects grave and serious consequences as stated in the often quoted case of Evans v. Johnson, 19 S. E. 623 (Sup. Ct. W. Va.):

"It lies at the foundation of justice in all legal proceedings that the person to be affected have notice of such proceedings. As such an appointment takes from the person the possession and control of his property, his person, his liberty, and stamps him with the stigma of insanity, and degrades him in public estimation, no more important order touching a man can be made short of conviction of infamous crime. Will it be said, in answer to this, that he is insane, and that notice to an insane man will do him no good?

"The response is that his insanity is the very question to be tried, and he the only party interested in the issue. Often, if given notice, he will be prompt to attend, and in his person be the unanswerable witness of his sanity; often, if not given notice, those interested in using or robbing him of his property will effectuate a corrupt plan. Almost as well might we convict a man of crime without notice."

And this court in Minnesota v. Probate Court, 309 U. S. 271, 276, has said:

"We fully recognize the danger of a deprivation of due process of proceedings dealing with persons charged with insanity, or as here, with a psychopathic person * * * and the special importance of maintaining the basic interests of liberty in a class of cases where the law, though 'fair on its face and impartial in appearance,' may be open to serious abuses in administration, and courts may be imposed upon if the substantial rights of the persons charged are not adequately safeguarded at every stage of the proceeding."

So that in this case, where the Supreme Court of Texas has held contrary to the decision of this court in Pennoyer v. Neff, and in view of the confusion which exists in the law generally, it is respectfully submitted that this court

should grant the Writ of Certiorari and should settle the law consistently with its prior decision in Pennoyer v. Neff.

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APPENDIX.

No. A-1330.

In the Supreme Court of Texas.

Hugh Henderson,
Petitioner,
v.
Shell Oil Company et al.,
Respondent.
} From Clay County, Second District.

OPINION.

A very full statement of this case is made in the opinion of the Court of Civil Appeals, for which see 202 S. W. 2d 492. We have concluded that each question of law presented to that court was correctly decided by it, but in the light of the contentions presented here in the application, which reflects much diligence and earnestness, we have concluded to write on what we conceive to be the principal questions before us. Our statement, in the main, will be in the language of the opinion of the Court of Civil Appeals, but in a somewhat condensed form.

At all times mentioned in this opinion Hugh Henderson has been a person of unsound mind and has resided in the State of Missouri. Some time prior to 1918 he acquired a 220-acre tract of land in Clay County, Texas. In the year last mentioned the County Court of Clay County appointed his brother, M. L. Henderson, a resident of that county, as guardian of his estate. In 1939 Shell Oil Company proposed to the guardian to purchase an oil and gas lease on his ward's land. Shell's attorneys recommended that a new order of appointment be obtained, the validity of the former order being questioned on the ground that

it did not contain an express adjudication that Hugh Henderson was of unsound mind. The recommendation was adopted, and M. L. Henderson again made application for appointment as guardian of that estate, and his application was granted. Notice of the application was given by posting. In addition, some sort of non-resident notice was served on Hugh Henderson in Missouri. Shortly after the 1939 appointment, the guardian, under order of the court, executed an oil and gas lease on Hugh Henderson's land in favor of Shell, and later executed a conveyance of one-half of the minerals in said land to the same company. Thereafter Shell drilled wells on the land, and has produced a large amount of oil therefrom. In 1943 Hugh Henderson, by next friend, filed an application for writ of certiorari in the District Court of Clay County, seeking a revision of the orders of 1918 and 1939 appointing M. L. Henderson guardian of his estate, and an annulment of the orders authorizing the oil and gas lease and the mineral deed. The case reached this Court on a contest over the question of who should act as next friend (143 Tex. 142, 182 S. W. 2d 994), but no question was decided on that appeal which has any relevancy to the questions now before the Court. In a non-jury trial of the certiorari proceedings in the district court, judgment was rendered affirming the orders of the probate court and denying Henderson any relief. That judgment was affirmed by the Court of Civil Appeals. 202 S. W. 2d 492.

We granted the application for writ of error for the purpose, primarily, of reviewing the holding of the Court of Civil Appeals with respect to the question of whether the orders of the county court authorizing the execution of the lease and the mineral deed were invalid because of the conflict of loyalties on the part of the attorney representing the guardian in those proceedings. Before discussing that question, we shall write briefly on the ques-

tion of the jurisdiction of the probate court to enter the order of 1939 appointing M. L. Henderson guardian of the estate of Hugh Henderson. We find it unnecessary to consider whether or not the order of 1918 was valid, since the lease and deed under attack were executed after the order of 1939 was entered.

Article 4132, R. C. S., authorizes probate courts to appoint guardians for nonresident persons of unsound mind, and Article 4123, R. C. S., authorizes those courts to determine that the person for whom a guardian is to be appointed is of unsound mind. A State has the power to control the property of nonresident minors and persons of unsound mind situated within its borders, through guardians appointed for their estates. Hoyt v. Sprague, 103 U. S. 613; Neal v. Bartleson, 65 Tex. 478. The validity of an order appointing a guardian of the estate of a person of unsound mind does not depend upon a prior legal adjudication of insanity. The fact of insanity may be established upon the hearing of the application for the appointment of the guardian. Bearden v. The Texas Company (Com. App.), 60 S. W. 2d 1031. Nor is it necessary that a prior adjudication of insanity in the state of the residence of the person of unsound mind be shown. Chaloner v. Sherman, 242 U. S. 455, 61 L. Ed. 427.

Article 4116, R. C. S., provides that a minor fourteen years of age or over shall be personally served with citation to appear and answer an application for the appointment of a guardian of him or of his estate. Article 4274 provides that each provision in the title relating to guardianships of persons and estates of minors shall apply to guardianships of persons of unsound mind "in so far as the same are applicable." Petitioner takes the position that the Article last cited makes the Article first cited applicable to guardianship proceedings for insane persons. We are not in agreement with this view. Article 4116 is

grounded upon the presumption that by the time the minor reaches the age of fourteen years he will have acquired some discretion and be capable of making a choice of guardian. No such presumption obtains in the case of a person of unsound mind. His discretion does not grow with the years. Article 4116 is, therefore, not applicable to him.

It was held in Storey v. Storey (Civ. App.), 105 S. W. 2d 370 (writ of error refused), that personal service of citation on a person of unsound mind was ineffective to confer jurisdiction on a county court to appoint a guardian for such a person and that notice by posting provided by Articles 4115 and 4115 was mandatory. That requirement was met in this case. Prior to 1941 (47th Leg., p. 867, ch. 541) there was no statute in Texas authorizing non-resident notice in a guardianship proceeding for a person of unsound mind. Our conclusion is that the Court of Civil Appeals correctly decided that the County Court of Clay County was acting within its jurisdiction in making the appointment of M. L. Henderson as guardian of the estate of Hugh Henderson in 1939.

It is our further view that due process within the meaning of the 14th Amendment to the Constitution of the United States was observed in the proceeding. Jones v. Prairie Oil Co., 273 U. S. 195; McKinley v. Salter (Civ. App.), 136 S. W. 2d 615 (writ dismissed, correct judgment). Such a proceeding is one in rem or quasi in rem. McCormick v. Blaine, 178 N. E. 195, 77 A. L. R. 1215; Re Sall, 59 Wash. 539, 140 Am. St. Rep. 885; Wallace v. Tinney (Iowa), 122 N. W. 936. In a proceeding of that nature the court may acquire jurisdiction by means of substituted or constructive service. Pennoyer v. Neff, 95 U. S. 714; Re Sall, supra; Case note 77 A. L. R. 1227. A contrary holding would have the effect of depriving the

courts of this State of control over lands situated within its borders.

We come now to consider the question upon which the application for writ of error was granted. Petitioner challenges the validity of the order authorizing the execution of the oil and gas lease to Shell and insists that it should be set aside and the lease annulled on the ground that such guardianship proceedings, though purporting to be in behalf and for the benefit of Hugh Henderson, were actually conducted in behalf of Shell. The primary basis for this contention is that the attorney who represented the guardian, and therefore the interest of Hugh Henderson, in those proceedings was at that time a broker employed by Shell on a contingent basis to procure for it an oil and gas lease on Hugh Henderson's land, and he was actually paid a commission by Shell for procuring such lease at the conclusion of the proceedings. The district court, after a full hearing, refused to vacate the order and annul the lease, and its judgment was affirmed by the Court of Civil Appeals. We should therefore view the evidence in the light most favorable to the respondent. Our statement of the facts bearing upon this question will be substantially in the language of the opinion of the Court of Civil Appeals.

In 1939 Shell carried on some explorations in the area in which Hugh Henderson's land is located. What information was derived from such explorations is not shown in the record, but as a result thereof representatives of Shell engaged Mr. Frank Bunting, an attorney who resided in Clay County and who was related by marriage to the Henderson family, to assist its leasing agent in obtaining leases on a block of land in that vicinity. It was agreed that for his services Mr. Bunting was to be paid a brokerage fee of 50¢ per acre on all leases which might be

obtained in that block. Thereafter, Mr. Bunting informed the guardian, M. L. Henderson, and other members of the Henderson family of the offer made by Shell to him. With knowledge of that fact, leases on lands belonging to other members of the Henderson family were obtained and the guardian agreed to lease the ward's land to Shell on the same terms, subject to the approval of the county court. With full knowledge conveyed to the guardian by Mr. Bunting of the facts with respect to the brokerage fee which he expected to receive from Shell, the guardian suggested to Mr. Bunting that he act as attorney for him, the guardian, in conducting the proceedings in the probate court. Mr. Bunting again pointed out to the guardian that he expected to receive a brokerage fee from Shell, but the guardian, nevertheless, requested Mr. Bunting to act as his attorney in the matter. A part of the general arrangement was that Shell would pay the costs of the probate proceedings, including the attorney's fee. There was nothing concealed about the transaction; in fact, it was voluntarily entered into with full knowledge of all the facts. Pursuant to the agreement, Mr. Bunting conducted the proceedings and was paid an attorney's fee for such services by Shell, as well as the brokerage fee which had theretofore been agreed upon. The proceedings were not, strictly speaking, adversary. The guardian received the same bonus per acre for the lease as other landowners in the vicinity. There is no showing of fraud or damage. Notwithstanding this, we are asked to declare the proceedings and the sale of the lease thereunder invalid on the ground that the attorney was subject to divided loyalties. It is a sound public policy which exacts utmost fidelity of attorneys, and that policy should not be weakened by the whittling down process or the adding of numerous exceptions to the rules calling for its application. On the other hand, loyalty to that policy does not require the setting aside of court orders and the destruction of titles to valu-

able property when, as in this case, the transactions are open and above board.

Petitioner places much emphasis on the fact that it appears that the county court was not informed of the fact that Mr. Bunting was being paid by Shell, but the district court before which the case was tried de novo had full knowledge of all the facts, and after a full hearing upheld the validity of the entire transaction. The Court of Civil Appeals, in a well-considered opinion, has found no grounds upon which to invalidate these proceedings, and we have concluded that a sound public policy does not require this court to do so.

We are unable to sustain any of the assignments brought forward in the application for writ of error, and it is accordingly ordered that the judgment of the Court of Civil Appeals, affirming that of the trial court, be affirmed.

J. E. Hickman,
Chief Justice.

Opinion delivered 11 Feb. 1948.

In the Court of Civil Appeals for the Second Supreme Judicial District of Texas.

Hugh Henderson et al.,
Appellants,
vs.
Shell Oil Company, Inc., et al.,
Appellees.
No. 14,826.

From the District Court of Clay County.

OPINION.

Since prior to the year 1918 Hugh Henderson has owned a 220 acre tract of land in Clay County, Texas. During all of such time Henderson has been a person of unsound mind, and during all of such time he has resided in the State of Missouri. In 1918 the County Court of Clay County entered an order appointing M. L. Henderson, a brother of Hugh Henderson, as guardian of the latter's estate. M. L. Henderson resided in Clay County. In 1939 M. L. Henderson again applied to the same court for letters of guardianship, and again an order was entered appointing him guardian of such estate. Shortly afterwards the guardian, under order of the court, executed an oil and gas lease on said land in favor of the appellee Shell Oil Company, and also executed what we may call a conveyance of half the minerals in said land to the same company. Shell drilled wells on the land, and has produced a large amount of oil therefrom.

In 1943 Hugh Henderson, by his next friend, filed an application for writ of certiorari in the District Court of Clay County, seeking a review and revision of the 1918 and the 1939 orders of the county court appointing a guardian, and the orders authorizing the oil and gas lease and the conveyance of half the minerals to Shell Oil Com-

pany. Art. 932, Revised Civil Statutes, and Rules 344 to 351, inclusive, Texas Rules of Civil Procedure. A contest over the question of who should act as next friend for Henderson was carried to the Supreme Court. Henderson v. Shell Oil Co., 143 Tex. 142, 182 S. W. 2d 994.

A non-jury trial of the certiorari proceeding in the district court resulted in a judgment which in effect confirmed the orders of the probate court and denied Henderson any relief. He has appealed, presenting five points of error. Appellees Shell Oil Company and the present guardian (M. L. Henderson having died during the pendency of the suit) have filed separate briefs, in each of which it is contended that the certiorari proceeding must be treated as a collateral attack on the probate proceedings because of lack of necessary parties. Since we have concluded that the probate orders are valid even as against a direct attack, we shall not undertake a decision of the question just mentioned, but for the purpose of this opinion shall treat the certiorari proceeding as a direct attack on the orders of the county court.

In 1918 M. L. Henderson made application to the County Court of Clay County for appointment as guardian of the estate of Hugh Henderson. In 1939 Shell Oil Company proposed to the guardian to purchase an oil and gas lease on the ward's land. Shell's attorneys recommended that a new order of appointment be obtained, on the ground, according to the testimony of one witness, that the 1918 order did not contain an express adjudication that Henderson was of unsound mind. M. L. Henderson again made application for appointment as guardian of said estate, and again was appointed as such. Notice of the 1918 application was given by publication in a local newspaper. Notice of the 1939 application was given by posting, and in addition a sort of nonresident notice was served on Hugh Henderson in Missouri. Both appointments are attacked on several grounds.

First, it is contended that the Texas court had no jurisdiction to adjudge a resident of another state insane and to appoint a guardian of his estate. We overrule this contention. There is language in the opinion in Redmon v. Leach, Tex. Civ. App., 130 S. W. 2d 873, writ dismissed, correct judgment, which supports appellant's contention. To the contrary, however, is the holding in In re Burges' Estate, Tex. Civ. App., 148 S. W. 2d 903. Article 4132, Revised Civil Statutes, provides among other things that a guardianship of the estate of a nonresident minor or person of unsound mind may be granted when such person has an estate located within the State of Texas and it is made to appear that a necessity exists for such guardianship. Redmon v. Leach declares that Art. 4132 is unconstitutional. In re Burges' Estate cites Redmon v. Leach, but refuses to follow the rule there announced, and declares that Art. 4132 is not unconstitutional, citing Hoyt v. Sprague, 103 U. S. 613, 26 L. Ed. 585, where the Supreme Court of the United States held that "there can be no doubt that the legislature of Rhode Island, where the property was situate, had power, first, to pass laws for the appointment of guardians of the property of nonresident infants, situate in that State; and secondly, it had power to prescribe the manner in which guardians shall perform their duties as regards the care, management, investment, and disposal of such property; and that this power is as full and complete as where the minors are domiciled in the State."

Appellant argues that Missouri alone had jurisdiction to declare the status of Hugh Henderson, whether sane or insane. But it is to be remembered that Texas, and not Missouri, had jurisdiction over the property of Hugh Henderson which was located in Texas. Without a guardianship in Texas, there would have been no person competent to handle or dispose of the Texas property. Neither Hugh Henderson, nor a guardian appointed by another state,

could have sold the Texas land or leased it for oil and gas development. As said in Erwin v. Holliday, 131 Tex. 69, 112 S. W. 2d 177, "It is now well settled that the states possess exclusive jurisdiction over property situated within their territorial limits." To quote again from the same opinion, "Of course, in the accomplishment of such purposes, the courts cannot act directly upon the person of the nonresident owner or claimant, but upon the title or the property itself." The case just cited does not involve property belonging to an insane person, but the basic rule is the same, whether the nonresident property owner be sane or insane. In Neal v. Bartleson, 65 Tex. 478, our Supreme Court held that a Texas court had jurisdiction to appoint a guardian of the Texas estate of nonresident minors, even where there was no statute expressly authorizing such an appointment. The opinion declares: "In England and America, however the rule may be elsewhere, it is held, that the courts of the country in which property of a minor may be, to whom is confided the general power to appoint guardians and to administer minor's estates, have the power to appoint guardians of the estates of minors resident elsewhere and to control their estates." In Bouldin v. Miller, 87 Tex. 359, 28 S. W. 940, the minors were residents of California. It was contended that the Texas probate court had no authority to appoint a guardian or to order sale of land situated in Texas which belonged to the minors. The Supreme Court pointed out that the minors could dispose of their Texas land only through proceedings in a Texas probate court. In 44 C. J. S., p. 60, it is said: "Guardianship of property of an insane person may be authorized where his residence and the property are within the territorial jurisdiction of the court; and, ordinarily, such a guardianship may be had although the insane person is a nonresident." A proceeding to commit an insane person, or to appoint a guardian of his person, is a proceeding in

personam, but a proceeding to appoint a guardian of the estate of a nonresident is primarily a proceeding in rem, jurisdiction of which depends not on the residence of the insane person but on the location of the property.

Appellant argues that a different rule would apply to guardianship of the estate of an insane person than would apply to guardianship of the estate of a minor. We do not see that there would be such a difference. In either case the court has authority to act because the property lies within the jurisdiction of the court, and because the status of its owner is such that the court is empowered under the law to assume control of the property. As said above, Texas has exclusive jurisdiction of the land in Clay County. Through its constitution, Art. 5, Section 16, Texas has vested in the county court jurisdiction of that land if its owner is a minor or a person of unsound mind, whether the owner resides within or without Texas. Neal v. Bartleson, supra. It is elemental that the Texas court, and the Texas court alone, has jurisdiction to inquire into and find the facts supporting its jurisdiction. A Texas court might in a proper case give full faith and credit to a judgment of a Missouri court adjudging Hugh Henderson to be an insane person, but still the ultimate finding as to insanity would be a burden resting on the Texas court, when the question was whether the owner of the Texas property occupied a status that would authorize the Texas court to assume control of the property. The adjudication of the Texas court as to minority, or as to insanity, would not be in the nature of a proceeding in personam, but would be a step in the determination of the question whether the property in Texas was subject to the jurisdiction and control of the court.

There is much argument in the briefs about whether there is or is not sufficient proof in the record of an adjudication of insanity in Missouri prior to the 1918 guardianship appointment by the Clay County Court. As we see

it, it is not material here whether there was or was not such an adjudication in Missouri. A rule that would require the Texas court to refrain from assuming control of the property lying within its jurisdiction until a Missouri court had declared the property owner insane would impair, or could even defeat entirely, the exercise of jurisdiction by the Texas court. Missouri might never take any action with respect to the question of Henderson's insanity, in which case, under the views entertained by appellant, the result would be that Texas would be left powerless to exercise the exclusive jurisdiction which it has over property situated within its territorial limits.

Appellant suggests that Texas would have jurisdiction only to maintain an ancillary guardianship, following an insanity proceeding in Missouri. This contention is answered in Neal v. Bartleson, 65 Tex. 478, where it is said that "the exercise of the power to appoint here the qualified nonresident guardian is the exercise simply of the power of the court to appoint guardians of the estates of such persons."

Appellant also argues that Article 4132 did not before it was amended in 1921 provide for a determination of insanity in what we might term an ordinary guardianship proceeding. Since 1876 the statute has authorized the appointment of a guardian of the estate of a nonresident minor or insane person. Even without that statute, under the principles announced in Neal v. Bartleson, 65 Tex. 478, cited supra, the court would have had jurisdiction to appoint the guardian. Authority to make the guardianship appointment would clearly imply authority to find the fact necessary to support jurisdiction of the county court of the estate in question, to-wit, that the nonresident owner was a minor or a person of unsound mind.

Appellant next argues that both guardianship appointments were invalid for lack of personal service on Hugh

Henderson. The opinion in Redmon v. Leach, Tex. Civ. App., 130 S. W. 2d 873, cited supra, so holds, and there is certain dicta in the opinion in Bearden v. Texas Co., Tex. Com. App., 60 S. W. 2d 1031, which might indicate a rule that an insane person over 14 years of age must be served personally when application is made for appointment of a guardian. Redmon v. Leach involved an appointment of a guardian of a nonresident, but in Bearden v. Texas Co., the insane person resided in Texas. Art. 4274 provides:

> "Each provision of this title relating to the guardianship of the persons and estates of minors shall apply to the guardianship of the persons and estates of persons of unsound mind, and habitual drunkards, in so far as the same are applicable."

Art. 4114 provides for issuance by the clerk of notice of an application for guardianship of a minor. Art. 4115 provides that the notice shall be posted for ten days. Art. 4116 provides that minors over fourteen years of age shall be personally served with citation. It is appellant's theory that Art. 4116, by reason of Art. 4274, is applicable to guardianships of insane persons, and that insane persons over fourteen years of age must be personally served with citation.

In the absence of a statute providing for nonresident notice on a nonresident minor or person of unsound mind, we do not see that proper notice could have been given under the statutes in force at the times of the appointments here involved, except by publication in a local newspaper in 1918, or by posting in 1939, unless the nonresident had been personally served within the borders of the state. "The life or force of a process in personam is limited to the territorial jurisdiction of the court that issued it, not beyond, and when a court or its officers seek to expand the reach of process beyond this, it is a nullity and judicial action in personam against a nonresident may not be

predicated thereon." 42 Am. Jur., p. 43. "Personal service on a nonresident defendant, outside the jurisdiction of the court, does not suffice to give the court jurisdiction over his person. When the process of a state court crosses the state line, it loses its vitality as an instrument on which a personal judgment can be rendered against a nonresident." Id. Nonresident notice is in legal effect substituted or constructive service. Neither in 1918 nor in 1939 was there any statute in Texas authorizing nonresident notice in a guardianship proceeding. While Erwin v Holliday, 131 Tex. 69, 112 S. W. 2d 177, cited supra, did not involve a guardianship proceeding, it is authority for the proposition that nonresident notice cannot be employed as a method of service on a nonresident in the absence of a statute providing for its use in the particular proceeding.

The basic error in appellant's contentions, both as to the jurisdiction of the Texas court to appoint a guardian and as to the question of personal service on Hugh Henderson, is the failure to treat the guardianship as a proceeding in rem rather than as a proceeding in personam. The primary purpose of the guardianship proceeding was not to have the County Court of Clay County adjudge the status of the nonresident Hugh Henderson, but to have that court exercise control of property lying within its jurisdiction.

Appellant's brief contains a suggestion that the 1918 appointment is invalid for failure to contain an express adjudication that Henderson was insane. The application for guardianship avers that Hugh Henderson is a person of unsound mind, and the order appointing a guardian recites that application for appointment of guardian of Hugh Henderson, a person of unsound mind, came on to be heard, and orders, adjudges and decrees, to quote from the order, "that said M. L. Henderson be and he is hereby

appointed guardian of the estate of Hugh Henderson, lunatic . . .'' Bearing in mind what is said above, we hold that the order of the court amounts to an express finding and adjudication by the court that Henderson was a person of unsound mind.

It is also contended that the two appointments are invalid because there was not a trial to a jury, and because no guardian ad litem was appointed by the court to represent Hugh Henderson. The authorities cited by appellant on the question of jury trial are not applicable to the proceedings now under review, and we find no authority to support the proposition that the orders were invalid for failure to appoint a guardian ad litem. Proceedings for the appointment of a guardian are not adversary in character. McKinley v. Salter, Tex. Civ. App., 136 S. W. 2d 615, writ dismissed, correct judgment.

Appellant's first point of error reads as follows:

> ''The oil and gas lease made to Shell Oil Company by M. L. Henderson as guardian, and the order of and proceedings in the County Court upon which it was based, are invalid and should be set aside, because the undisputed evidence and admissions of Shell show that such guardianship proceedings, though purporting to be in behalf of and for the benefit of Hugh Henderson, were actually conducted in behalf of Shell Oil Company, and that without disclosure to the County Court the attorney who represented the guardian and therefore the interests of Hugh Henderson in said proceedings was then and there a broker in the pay of Shell Oil Company, employed by it on a contingent basis to procure for it an oil and gas lease on Hugh Henderson's land and at the conclusion of the proceedings was paid a commission by Shell for procuring said lease as well as attorney's fees for conducting said proceedings, and the Court

erred in failing and refusing to vacate and cancel said oil and gas lease and said order and proceedings upon which it was based."

The judgment appealed from upholds the guardianship proceedings. Disputed fact questions must be resolved in favor of appellees. Bearing this in mind, it appears from the evidence that in 1939 Shell Oil Company made some seismographic exploration in the area where Hugh Henderson's land was located. What information such exploration disclosed is not shown by the record, nor was it disclosed to the guardian nor to the county court when application was made to lease the land to Shell. Shell representatives got in touch with Mr. Frank Bunting, an attorney in Clay County who was related by marriage to the members of the Henderson family. They, together with Hugh Henderson, owned a considerable amount of land in the area. Shell engaged Mr. Bunting to obtain leases on such land, if it could be done, and authorized him to pay $5.00 per acre for the leases. Shell also agreed to pay him a brokerage fee of fifty cents per acre on all leases which he might obtain. Mr. Bunting approached M. L. Henderson and other members of the family, and told them of the offer made by Shell for leases. Leases were obtained on lands belonging to other members of the family, and the guardian agreed to lease the ward's land to Shell, subject to approval of the county court. When Mr. Bunting first approached the guardian, and others of his relatives as well, he advised them that he would receive a brokerage fee from Shell on all leases that he might obtain. Discussion arose between the guardian and Mr. Bunting concerning the handling of the proceedings in the probate court, and the guardian suggested that Mr. Bunting act as attorney for the guardian in presenting the matter to the court. Mr. Bunting again pointed out that he expected to receive a brokerage fee from Shell, but nevertheless it was agreed between Mr. Bunting and

the guardian that the former should act as attorney in presenting the lease matter to the county court. It was also agreed that Shell would pay all the costs of the probate proceeding, including the attorney's fee. Pursuant to the arrangement made, Mr. Bunting represented the guardian in the probate court proceedings, and was paid an attorney's fee for such services by Shell, and was also paid the brokerage fee by Shell which had theretofore been agreed upon. The various applications, orders, etc., used in the probate proceedings were first prepared by Shell attorneys, and then sent to Mr. Bunting, who made changes in some of the papers, but not in others.

Appellant contends that the 1939 order of appointment, and especially the lease to Shell, must be stricken down because Mr. Bunting, while acting in the employ of Shell, also acted as attorney for the guardian in the probate proceedings. It is argued that Mr. Bunting could not lawfully represent both buyer and seller, especially in a case where the seller was a guardian who first had to apply to the court for authority to make the sale. It is argued that the evidence shows without dispute that the guardianship proceedings were conducted as an enterprise of Shell Oil Company, and for its benefit, and not for the benefit of the ward's estate. It is contended that the law provides that the guardian may have an attorney, and that if he does, the attorney must not represent conflicting interests. While a great many decisions and statements of text writers are cited by appellant, none of them is in point with respect to the facts of this case, except in so far as they declare general principles of law. Some of them involve claims of attorneys for fees, where they represented conflicting interests without notice to the parties of such conflict. Others involve the authority of attorneys to bind clients in such situations. Many of the cases involve the general rule that sales will not be upheld where the guardian, trustee, or other representative purchases prop-

erty of the estate in his charge. Other cases involve sales by fiduciary representatives to wives, law partners, or business associates of the fiduciary. In the kinds of cases just mentioned, and in many other kinds of cases, courts have refused to uphold sales, or to enforce contracts or other rights, on the ground of public policy. In a suit on a gambling contract, for instance, while a court may say that there is no contract, the real basis for refusal to enforce the contract is that the court believes that it would be unsound public policy to enforce it. In the cases of purchases of property by representatives from estates in their charge, the courts in the most positive language have condemned such purchases, and have employed even fictional devices to annul them. They do so on the ground that it is against public policy to permit such purchases, or sales, and that inquiry will not be made into the question of the fairness of the sale or the adequacy of the purchase price. While the rules in this respect are so well known that it is not necessary to cite the host of decisions declaring them, an outstanding opinion is that of the Supreme Court of the United States, in Michoud v. Girod, 4 How. 503, 11 L. Ed. 1076. Our problem is to determine whether such rules are applicable to the facts before us. If the rules applicable to purchases by fiduciaries from the estates in their care, or to sales by fiduciaries to wives, law partners, and business associates, govern the case before us, then we will not consider the adequacy of the price, nor will we inquire whether the sale was advantageous to the estate or not. Nor would it be material whether the question was raised on direct appeal from the county court, or by certiorari. This is true, because the courts will go far in striking down sales made under such circumstances. But as we analyze the facts here presented, the case does not come within those rules.

The lease was not made to a guardian or to one so closely connected with him that the conveyance will be

held invalid under the rules just discussed. Nor is it a case where the guardian received a fee or other compensation from the purchaser for making the sale. The courts in those cases will hasten to declare the sale invalid unless the rights of innocent purchasers are involved. There is no claim that Mr. Bunting made any misrepresentation, of fact or of law, to the guardian or to the county court in the purchase of the lease or in the presentation of the matter to the court. There is no claim that the written lease, or any of the court proceedings, fail to contain the agreements made between the guardian and the lessee. There is no suggstion, either by way of proof or by contention by appellant, that the application to make the lease, the order confirming it, or the lease itself, would have contained different language if prepared by any other attorney. Mr. Bunting's role as attorney for the guardian, under the facts shown by the record, cannot be so magnified as to bring the case within the classes of cases above enumerated. Had the guardian been paid a brokerage fee by Shell for obtaining the lease, we would have a completely different case, and one which any court would quickly and sternly decide. But that did not happen.

Appellant cites cases where there was a conflict of interests between a minor and the person representing him as next friend in a suit, but those cases are not like the one before us. Nor is Slay v. Burnett Trust, 143 Tex. 621, 187 S. W. 2d 377, in point on the facts. In that case the conduct charged as fraudulent was that of the trustee himself and his law partner, which brought the case within the rules above discussed. Many statements can be found in opinions of appellate courts to the general effect that it is improper for an attorney to represent conflicting interests, but those statements must in each instance be read in the light of the facts involved in the particular case in order to arrive at a true interpretation of them.

In certain kinds of cases, as in sales of estate property to a fiduciary, the court may declare the sale improper, and set it aside, without respect to the question of damage to the estate. In other kinds of cases, as where fraudulent misrepresentations are made by the purchaser to the guardian, the court might declare that fraud had been committed, and yet decline to set the sale aside in the absence of a showing of damage to the estate. The distinction in the two kinds of cases, and in the attitudes of the courts toward them, lies in the fact that in the first the court strikes down the sale as a matter of public policy, and by way of issuing warning to all fiduciaries that they must not trade and traffic in the property of the trust estate, while in the other the object of the court is to afford redress for a wrong committed.

Appellant argues that full disclosure was not made to the guardian and to the court about the seismographic exploration which Shell had made, but we know of no rule of law requiring the purchaser of oil leases to disclose to the seller information that the purchaser may have concerning the land which the seller may not have, in the absence of a fiduciary or confidential relationship between the buyer and the seller. It is argued that it was improper not to disclose to the county court the fact that the guardian's attorney had a personal interest in the transaction by way of a brokerage fee to be paid him by the Shell. This contention has caused us some concern, but we have concluded that the most effect which could be given it would be to say that it would be ground for setting aside the sale if it were reasonably shown that such non-disclosure caused the court to approve a sale at an inadequate price. It would not bring the case within the rules declaring sales invalid for reasons of public policy without regard to the question of damage.

Appellant attacks the conveyance of half the minerals made by the guardian on the theory that (1) the sale was

made solely under Article 4195a, which statute does not authorize the sale of minerals, royalties, the right to make future leases, and future bonuses, (2) no facts existed authorizing the sale under Article 4195a, and (3) the sale was made without any authority of law.

Article 4195a, Vern. Tex. Civ. St., provides that whenever the estate of a ward consists in part of real estate, and any part or parcel of such real estate produces no revenue or does not produce sufficient revenue to make a fair return upon the value of such part or parcel of real estate, and the guardian does not deem it advisable or advantageous to improve such part or parcel of real estate, and believes that the sale thereof and investment of the money derived therefrom would be to the best interest of said estate under all the circumstances, he may apply to sell it and the court may order it sold. No oil had been discovered on or produced from this land at the time of the sale of half the minerals. The guardian had from time to time received small amounts of money from grass leases, and from sale of oil and gas leases (which had expired prior to the time the Shell lease was made). He received $2200.00 from the sale of the lease to the Shell. It was shortly after this that he made the mineral conveyance to the Shell. The guardian's application to sell half the mineral interest in the land alleges facts substantially the same as those set out in Article 4195a, and in ordering the sale the county court found that such facts existed. The district court obviously found the same facts, in refusing to set aside the probate order. It cannot be said that there is no evidence to support the finding thus necessarily to be implied.

Appellant argues, but cites no authority in support of the argument, that Article 4195a "does not authorize the sale of minerals, royalties, the right to make future oil and gas leases and future leases." Article 4195a author-

izes the sale of unproductive "real estate". This clearly warrants a sale of the minerals or an interest therein separate and apart from the surface. See Avis v. First Nat. Bank, 141 Tex. 489, 174 S. W. 2d 255, and authorities therein cited.

All that is said above concerning Mr. Bunting's connection with the making of the lease is applicable to the sale of the mineral interest.

Many other questions are discussed in the briefs and written arguments of the parties, comprising more than six hundred pages, but we have discussed the questions which we consider necessary to a proper disposition of the appeal.

Finding no error, we affirm the judgment of the trial court.

Atwood McDonald,
Chief Justice.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1948.

HUGH HENDERSON, Individually and by J. WILLARD GRAGG, His Next Friend Appointed by the Court, Petitioner,

vs.

SHELL OIL COMPANY, INC.; NATIONAL SURETY CORPORATION; HARTFORD ACCIDENT AND INDEMNITY COMPANY; W. L. MOUNT; CLARA GRAGG; J. L. GRAGG; RUBY BUNTING; FRANK BUNTING; MYRTLE HENDERSON, Individually and as Executrix of the Estate of M. L. HENDERSON, Deceased; RUTH GARRETT; MULDROW GARRETT; GRACE B. OHEIM, Individually and as Executrix of the Estate of A. J. OHEIM, Deceased; MAY KARSTERER, Individually and as Administratrix of the Estate of SYLVESTER KARSTERER, Respondents.

No. 218.

PETITIONER'S REPLY BRIEF.

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No. 218.

PETITIONER'S REPLY BRIEF.

SUMMARY OF ARGUMENT.

I.

Respondents' several arguments based on the false premise that Hugh Henderson is or was insane are not sound. Henderson's sanity is presumed. Whether he has been legally adjudged insane is the question for decision in this case.

II.

Neither of the Texas sanity and guardianship proceedings was based on an asserted prior adjudication by a Missouri court that Hugh Henderson was insane. There is no competent evidence in the record that Henderson

was ever adjudged insane by a Missouri court. The Texas proceedings were entirely independent.

Articles 4132 and 4285, Vernon's Revised Civil Statutes of Texas.

III.

The "notice" served on Henderson in Missouri in the 1939 insanity-guardianship proceeding in Texas was not authorized nor required by the Texas law. Therefore, it cannot supply any constitutionality to the Texas proceedings in 1939.

Coe v. Armour Fertilizer Works, 237 U. S. 413, 35 S. Ct. 625, 59 L. Ed. 1027;

Wuchter v. Pizzutti, 276 U. S. 13, 38 S. Ct. 259, 72 L. Ed. 446.

IV.

Hugh Henderson's mere physical presence in the Courtroom in Texas during the 1939 sanity-guardianship "hearing" was not "**an appearance**" and is of no legal consequence. Henderson was not asked a question, was not placed on the witness stand, did not testify, made no statement, said nothing, and nothing was said to him, he signed no papers and had no attorney or guardian ad litem. No jury was present. Henderson waived no jury.

Hugh Henderson's application thereafter to the District Court in Texas to set aside the purported action of the County Court could not supply the defect in "process" in the County Court which he sought to attack. Moreover, District Courts in Texas have no jurisdiction to determine sanity and appoint guardians. It having been alleged in those proceedings that Henderson was insane, he could not waive the issue of process.

Thomason v. McGeorge (Tex. Comm. App.), 285 S. W. 285;

4 Tex. Jur. 624;
North v. Washtenaw, 59 Mich. 624, 26 N. W. 810;
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V.

There was no real or attempted seizure of Henderson's Texas property in either of the Texas sanity-guardianship proceedings until after the Texas Court has purportedly adjudged Henderson to be insane and purportedly appointed a guardian.

VI.

The decision of this Court in Chaloner v. Sherman, 242 U. S. 455, does not control this case. In that case both the alleged incompetent and his property were in the State of New York when the proceeding was instituted, and there was personal service on the alleged incompetent within the State of New York.

VII.

The confusion regarding "due process" in insanity proceedings is further manifested and demonstrated by the number of citations in respondents' briefs and the many distinctions undertaken by the courts in those cases, as well as those undertaken by petitioner, so that it is most apparent that this Court should grant a writ of certiorari and settle the law in this important respect.

ARGUMENT.

I.

Respondents attempt to escape the collapse of their structure based upon "undue process," which will inevitably follow the decision of this Tribunal, by hastily laying down a smoke-screen to obscure a decision on the merits and secure their ill-gotten gains obtained by illegal and undue process, by an attempt to misstate the facts and draw a false conclusion from such wrongful premise. They therefore lay down two erroneous propositions:

> **First**: That as Petitioner had already been legally declared insane in **Missouri**, his illegal declaration of insanity in **Texas** was justified; and
>
> **Second**: That in any event, during a hearing Petitioner walked in and out of the Courtroom, thereby waiving all illegal process and entering his personal appearance in Texas.

Almost ninety percent of the brief of Respondent W. L. Mount is based on the false premise that Hugh Henderson is insane. That is the very question to be determined in this case. The decisions of the Texas Courts which are under attack here are based in part on the same false premise.

The other arguments of Respondent Mount and the argument of Respondent Shell Oil Company in regard to Hugh Henderson's mere presence in the County courtroom during the 1939 proceeding against him, and his application to the District Court to avoid and set aside the purported judgment of the County Court, are to the **contrary**. These arguments assume Hugh Henderson to be sane. If he were insane he could not have bound himself, either by a personal presence or a purported appearance. District Courts in Texas have no jurisdiction to determine sanity. That jurisdiction is vested in County Courts. Article 4102,

Vernon's Revised Civil Statutes of Texas. And the law is generally accepted to be that one who is alleged to be insane cannot waive issuance and service of process. North v. Washtenaw, 59 Mich. 624, 26 N. W. 810; Snyder v. Superior Court, 206 Calif. 346, 274 Pac. 337; State ex rel. Terry v. Holtcamp, 330 Mo. 608, 51 S. W. (2d) 13; Storey v. Storey (Tex. Civ. App.), 105 S. W. (2d) 370.

Respondent Shell Oil Company also states and argues that Hugh Henderson had been adjudged insane by a Missouri court. This is absolutely false and untrue. Even if the evidence of record warranted that statement and argument (which it does not), it would not aid the illegal seizure and confiscation of petitioner's property. The sanity-guardianship proceedings in Texas in 1918 and 1939, culminating in the purported appointment of a Texas guardian for Hugh Henderson, do not even purport to be based on any adjudication by a Missouri court that Henderson was insane. Article 4285, Vernon's Revised Civil Statutes of Texas, provided:

> "Where a guardian and his ward are non-residents, such guardian may file in the County Court of any county where all or part of the ward's estate is located, a full and complete transcript from the records of a court of competent jurisdiction where he and his ward reside, showing that he has been appointed and has qualified as guardian of the estate of such ward * * * and upon the filing of such transcript * * * the guardian shall be entitled to receive letters of guardianship of the estate of such minor, person of unsound mind, or habitual drunkard, situated in the state * * *."

An examination of the applications filed in the Texas County Court which appear at pages 51 and 55, respectively, of the printed record, and an examination of all of plaintiff's exhibits number 44, being all of the proceedings in the County Court of Clay County, Texas, in regard

to Hugh Henderson, reveal no mention of any adjudication by any Court in Missouri (where it was alleged that Hugh Henderson resided) that Hugh Henderson was insane or that a guardian had been appointed for him. The reason no mention was made of such was because there had been none. The attempt by respondents to mislead this Court to believe that there was such an adjudication clearly is a confession by them that there is no merit to their contentions.

The "notice" which was served on Hugh Henderson in Missouri in connection with the 1939 sanity-guardianship proceeding upon which Respondent Shell Oil Company now seeks to rely, confers no jurisdiction. That "notice" must be an invention of the legal department of Shell Oil Company. The Legislature of Texas has not provided for any such notice and the Texas Courts said so in this very case. It appears on page 72 of the printed record that the Court of Appeals of Texas said:

> "A sort of non-resident notice was served on Hugh Henderson in Missouri,"

and on page 77 of the record that the same Court said:

> "Neither in 1918 nor in 1939 was there any Statute in Texas authorizing non-resident notice in a guardianship proceeding."

These statements were confirmed by the Supreme Court of Texas, as appears from page 90 of the printed record, where it is said:

> "In addition, some sort of non-resident notice was served on Hugh Henderson in Missouri."

And again at page 92 of the printed record where it appears that the Supreme Court of Texas said:

> "Prior to 1941 (47th Leg., p. 867, ch. 541) there was no Statute in Texas authorizing non-resident notice in a guardianship proceeding for a person of unsound mind."

Of such a situation, this Court said in Coe v. Armour Fertilizer Works, 237 U. S. 413, 424:

"To one who protests against the taking of his property without due process of law, it is no answer to say that in his particular case due process of law would have led to the same result because he had no adequate defense upon the merits. Rees v. Watertown, 19 Wall. 107, 123.

"Nor can extra-official or casual notice, or a hearing granted as a matter of favor or discretion, be deemed a substantial substitute for the due process of law that the Constitution requires. In Stuart v. Palmer, 74 N. Y. 183, 188, which involved the validity of a statute providing for assessing the expense of a local improvement upon the lands benefited, but without notice to the owner, the court said: 'It is not enough that the owners may by chance have notice, or that they may as a matter of favor have a hearing. The law must require notice to them, and give them the right to a hearing and an opportunity to be heard.' The soundness of this doctrine has repeatedly been recognized by this court. Thus, in Security Trust & S. B. Co. v. Lexington, 203 U. S. 323, 333, the court, by Mr. Justice Peckham, said, with respect to an assessment for back taxes: 'If the statute did not provide for a notice in any form, it is not material that as a matter of grace or favor notice may have been given of the proposed assessment. It is not what notice, uncalled for by the statute, the taxpayer may have received in a particular case that is material, but the question is whether any notice is provided for by the statute' (citing the New York case). So, in Central of Georgia R. Co. v. Wright, 207 U. S. 127, 138, the court said: 'This notice must be provided as an essential part of the statutory provision, and not awarded as a mere matter of favor or grace.' In Roller v.

> Holly, 176 U. S. 398, 409, the court declared: 'The right of a citizen to due process of law must rest upon a basis more substantial than favor or discretion.' And in Louisville & N. R. Co. v. Central Stock Yards Co., 212 U. S. 132, 144, it was said: 'The law itself must save the parties' rights, and not leave them to the discretion of the courts as such.' "

Hugh Henderson's physical presence in the County courtroom in Texas in 1939 was not an "appearance" in the proceeding. The evidence of what happened in the County courtroom in Texas on that occasion was not printed in this Court. It was not considered necessary by either party at the time the record to be printed was agreed upon. However, the contentions of the respondents make it necessary to refer to the original record in this regard. Pages 51-53, 55-56 and page 66 in Volume 1 and Plaintiff's Exhibit 44 in Volumes 2 and 3 of the transcript of the record on file in the office of the clerk in this court, disclose that, while Henderson was physically present in the courtroom, he did not sign any papers, he said nothing, nothing was said to him, he had no attorney and no guardian ad litem, he was not placed on the witness stand, no questions were asked him, and he asked no questions. From all that appears in the record he may have just been enticed under some subterfuge to walk in and out of the courtroom, perhaps looking for some one or something. It is the law of Texas as stated in 4 Tex. Jur. 624, that: "The mere presence of the defendant in Court when his case is being tried, is insufficient," to constitute an appearance. And so also it is generally held that one who is alleged to be insane cannot waive the issuance and service of process. North v. Washtenaw, 59 Mich. 624, 26 N. W. 810. Snyder v. Superior Court, 206 Cal. 346, 274 Pac. 337; State ex rel. Terry v. Holtcamp, 330 Mo. 608, 51 S. W. (2d) 13; Story v. Story (Tex. Civ. App.), 105 S. W. (2d) 370.

There was no seizure of Hugh Henderson's Texas property by any officer of the County Court in Texas in either of the proceedings against him. There was not even an attempt made to seize any property. The applications for appointment of a guardian previously mentioned, which appear at pages 51 and 55 of the printed record, and the process issued by the County Court, which appears between pages 51 and 61 of the printed record, discloses that no property was described in the proceedings, and that Hugh Henderson owned any property was mentioned only generally. There is no statement by the sheriff of Clay County, Texas, who executed the process in those cases in that county, that he seized any property. Plaintiff's Exhibit 44, which is the full transcript of the proceedings in the County Court, discloses that the first time the property belonging to Hugh Henderson which is involved in this proceeding, is mentioned was in the inventory filed by the guardian purportedly appointed after the supposed adjudication that Hugh Henderson was insane.

The decision of this Court in Chaloner v. Sherman, 242 U. S. 455, does not determine the questions here involved. It does not support the decisions of the Texas courts as claimed by Respondents. The following quotation from the opinion in that case discloses the difference in that case and the instant case, where the Court said (242 U. S. 457-8, and 462):

> "The proceedings were held in New York City where much of the plaintiff's property was located. For over two years prior to the entry of the earlier order plaintiff had been an inmate of Bloomingdale, a private hospital near that city. At each stage in the proceeding leading up to the order of June 23, he was personally served with notice • • • That court had jurisdiction because the plaintiff and his property were in New York."

If Hugh Henderson had been served personally with process in Texas, in the Texas proceedings, and if his property had been seized in either of those proceedings, the situation presented by this case might be controlled by the decision in the Chaloner case, but Henderson was not served personally in Texas and his Texas property was not seized prior to judgment.

The efforts of respondents to avoid a decision on the merits are further evidence of the validity of Petitioner's contention that the writ of certiorari should be granted and the question of what is due process of law in insanity and guardianship proceedings determined and declared by this Court. Is there really a difference in the process required for due process of law when the proceeding is to determine the sanity and appointment of a **guardian of the estate**, and when the proceeding is to determine sanity and to appoint a **guardian of the person** as well as of the estate? Some of the decisions could be so interpreted. Is there really a difference in the required process, depending on whether the purpose of the proceeding is to **conserve or to sell** the property of an alleged insane person? Some of the decisions would so indicate. Is there really a difference in the process necessary for due process of law depending on whether the property to be affected is owned by a resident or non-resident? It seems that the full faith and credit clause of the Constitution of the United States would preclude any such holding. If a non-resident of Texas may be determined to be insane by the Texas Courts merely because he owns land in the State of Texas, then that judgment should be entitled to full faith and credit in the state where the land owner resides, so that the acts of the land owner in the state of his residence might be avoided by a judgment of insanity rendered against him in some foreign state. The mischief which the full faith and credit clause could work if the rule of due

process of law announced by the Texas Courts is allowed to stand and spread would be untold.

For these reasons and the reasons stated in the Petition for Writ of Certiorari, and the brief in support thereof, Petitioner respectfully prays that the Writ of Certiorari be granted.

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No. 218

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October Term, 1948.

HUGH HENDERSON, BY J. WILLARD GRAGG, NEXT FRIEND, *Petitioner,*

vs.

SHELL OIL COMPANY, INCORPORATED, *ET AL., Respondents.*

BRIEF AND ARGUMENT OF SHELL OIL COMPANY, INCORPORATED, IN OPPOSITION TO PETITION FOR WRIT OF *CERTIORARI.*

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IN THE SUPREME COURT OF THE UNITED STATES.
October Term, 1948.

No. 218

HUGH HENDERSON, BY J. WILLARD GRAGG, NEXT FRIEND, *Petitioner,*

vs.

SHELL OIL COMPANY, INCORPORATED, *ET AL.*, *Respondents.*

BRIEF AND ARGUMENT OF SHELL OIL COMPANY, INCORPORATED, IN OPPOSITION TO PETITION FOR WRIT OF *CERTIORARI.*

May It Please the Court:

Supplemental Statement of the Case.

The District Court in the judgment appealed from found that on March 6, 1908, petitioner, Hugh Henderson, was adjudicated to be a person of unsound mind by a court of competent jurisdiction in Pike County, Missouri, and that on the following day he was incarcerated in the state insane asylum at Fulton, Missouri, where he remained for twelve years, or until August 4, 1920 (R. 35). There was no evidence of his restoration to sanity by a proper Missouri court. While petitioner was still in the insane asylum, to-wit, on December 18, 1918, M. L. Henderson was appointed guardian of his Texas estate (R. 35) on statutory notice by publication (R. 52-53, 46). Some question having arisen

as to the validity of the 1918 guardianship proceedings, on April 17, 1939, pursuant to statutory posting notice (R. 57-58, 46), and personal notice to Hugh Henderson in Pike County, Missouri (R. 58-59), M. L. Henderson was again appointed guardian of the Texas estate of Hugh Henderson on the ground he was a person of unsound mind (R. 59-61). The two guardianship proceedings were consolidated (R. 60). Hugh Henderson came from Missouri to Texas and was present in the courtroom at the time he was declared insane and a guardian was appointed in the 1939 proceedings. The order appointing M. L. Henderson guardian recited "came also Hugh Henderson in person" (R. 60, 46). Three years later petitioner, acting through his next friend, filed a petition for certiorari in the District Court of Clay County, Texas (R. 1-7), wherein he was granted a trial de novo in the guardianship proceeding (Rule 350, Texas Rules of Civil Procedure). After hearing the evidence the District Court found the petitioner was a person of unsound mind and affirmed the appointment of a guardian of his Texas estate (R. 33-38). It is this District Court order that was affirmed by the Ft. Worth Court of Civil Appeals (R. 71) and by the Supreme Court of Texas (R. 94-95). (*All emphasis has been supplied by us.*)

Summary of Petitioner's Argument.

Summarizing petitioner's argument, he contends:

A. That the courts of Texas are without power to appoint a guardian for a nonresident person of unsound mind and as an incident thereto to determine the fact of insanity. (Specification of Error A, brief 17.)

B. That if the courts of Texas have such power the action is *in personam* and personal service of process is necessary. (Specifications of Error C and D, brief 17.)

C. That if constructive service is sufficient there must be a prior seizure of the property. (Specification of Error B, brief 17.)

Summary of This Respondent's Argument.

Petitioner's contentions are not supported by either the facts or the law. The record does not sustain his assumption of facts and every Federal question raised by him has heretofore been decided against his contention by this Court.

POINT I: Petitioner's petition does not raise *any* Federal question because the County Court order appointing a guardian of his Texas estate recites *petitioner was present in the county courtroom* in Clay County, Texas, in 1939, at the time he was determined to be insane and the guardian of his estate was appointed (R. 60, 46). *This personal appearance was sufficient to give the County Court jurisdiction of petitioner's person,* if that be required. Likewise, the District Court expressly found it had jurisdiction of petitioner's person (R. 37) and *that finding of fact stands unassailed in this Court.* Petitioner voluntarily invoked the jurisdiction of the District Court, wherein he was granted a *trial de novo,* and his appearance in that court constituted a general appearance and cured any lack of service in the County Court. *Glass* v. *Smith,* 66 Tex. 548, 2 S. W. 195; *Perry* v. *Rohde,* 20 Tex. 730.

POINT II: *Chaloner* v. *Sherman,* 242 U. S. 455, 61 L. ed. 427, is a complete answer to petitioner's Specification of Error A (brief 17). In that case, *this Court upheld the constitutionality of a New York statute similar to the Texas statute under attack* and approved a determination of incompetency and the appointment of a guardian of a nonresident person who *had not* been adjudicated incompetent

in the state of his residence. Specifications of Error C and D (brief 17) are fully answered by *Jones* v. *Prairie Oil and Gas Company,* 273 U. S. 195, 71 L. ed. 602, wherein this Court held that the appointment of a guardian on constructive notice does not violate the due process provision of the Fourteenth Amendment; and by *Cunnius* v. *Reading School District,* 198 U. S. 458, 49 L. ed. 1125, and *Blinn* v. *Nelson,* 222 U. S. 1, 56 L. ed. 65, wherein this Court held *the appointment of an administrator of the estate of a living adult absentee on constructive notice does not violate the due process provision of the Fourteenth Amendment.* In the case at bar the Texas Supreme Court held that, under the laws of that state, a proceeding for the appointment of a guardian of a nonresident person of unsound mind is *an action in rem or quasi in rem* (R. 92). Personal service of process is not required in an action in rem or quasi in rem. 16 C. J. S. 1246-1247.

Point III: Petitioner's contention in Specification of Error B (brief 17) that there must be a prior seizure of property is answered by *Wootters* v. *Wynne,* (Civ. App. Tex.), 7 S. W. (2d) 940 (no writ), holding that *upon the filing of a petition* for the appointment of a guardian *the County Court obtains jurisdiction of the property* of the ward within the state, and also by *Cunnius* v. *Reading School District,* 198 U. S. 458, 49 L. ed. 1125, *supra,* wherein this Court overruled a similar contention made by the petitioner in that case. Filing of the petition constituted a seizure of the property.

ARGUMENT.

POINT I.

Since the courts of Texas had jurisdiction of petitioner's person as well as of his estate, his petition for writ of *certiorari* does not raise any Federal question.

The record in this case does not even support petitioner's erroneous interpretation of the law. He contends that the courts of Texas could not appoint a guardian for Hugh Henderson's Texas estate without a prior adjudication of insanity in Missouri *or* without jurisdiction of his person (brief 17). The record shows that not one, but both of these facts were present in this case, and for that reason no constitutional question is involved even under petitioner's mistaken theory of the law. The District Court found that on May 6, 1908, while a resident of Pike County, Missouri, Hugh Henderson was duly adjudicated to be a person of unsound mind and that thereafter he spent twelve years in the insane asylum at Fulton, Missouri (R. 35). There is no evidence showing his restoration to sanity. There was therefore a continuing presumption of insanity. This finding of fact by the District Court is not attacked in petitioner's application for writ of certiorari in this Court.

Petitioner's alternative requirement is that if there had not been a prior adjudication the courts of Texas must have had jurisdiction of Hugh Henderson's person. They did. While, as we shall hereafter show, an action for the appointment of a guardian of the estate of a nonresident person of unsound mind is an action in rem or quasi in rem and constructive service is sufficient, nevertheless both the County Court and the District Court of Clay County, Texas, actually had jurisdiction of petitioner's person.

a. ***The fact that petitioner was present in the County Court of Clay County, Texas, at the time the guardian of his Texas estate was appointed in 1939 was sufficient to comply with the due process provision of the Fourteenth Amendment, even in a personal action.***

Prior to the appointment of the guardian in 1939, notice was given by posting (R. 57-58) and another notice was personally served on Hugh Henderson in Missouri (R. 58-59). We concede that this out of state notice was constructive in its nature. Nevertheless, it was an effective notice, as evidenced by the fact that Hugh Henderson came to Texas and was present in the courtroom at the time the County Court found he was a person of unsound mind and appointed a guardian of his Texas estate. The order appointing the guardian states: *"and came also Hugh Henderson in person."* (R. 60) This personal appearance at the time and place of the hearing complied with the due process provision of the Fourteenth Amendment, even to the extent of permitting a personal judgment against him. 12 C. J. 1233. This rule has been applied to a proceeding for the adjudication of insanity and appointment of a committee for the *person and estate* of a person of unsound mind. *Lackey* v. *Lackey,* 8 B. Monroe 107, 47 Ky. 107. In that case *no notice whatever was given* to the defendant, but, in holding that *his appearance was sufficient,* the court said:

> " • • • Where, however, the defendant is brought into court, and the inquest held in open court, neither notice or writ is necessary. Persons of unsound mind are under the protective care of the chancellor, whose duty it is to watch over and guard their interest scrupulously. Being in court, the presumption is, this duty was discharged, and the court satisfied of the propriety of holding an inquest, without any affidavit setting forth facts to authorize the proceeding." (pp. 107-108)

This rule has even been applied to an adjudication of in-

sanity for the purpose of commitment to an insane asylum. *Cook* v. *Dougherty*, (Ct. App. D. C.) 32 F. (2d) 839.

While there are a few cases holding that personal service is necessary even when an insane person appears at the hearing, each of these cases is based upon the interpretation of a statute which expressly required personal service. *None of them hold that notice sufficient to bring the insane person into the courtroom at the time of the hearing does not constitute due process of law under the Fourteenth Amendment.*

b. *Under the laws of Texas petitioner's voluntary appearance in the District Court, wherein he was granted a trial de novo, cured any lack of service of process in the County Court.*

The District Court expressly found it had jurisdiction of petitioner's person (R. 37). *This finding was not attacked in either of the state appellate courts and is not attacked in this court.* Petitioner filed a petition for writ of certiorari in the District Court (R. 1-7) wherein he was allowed a *trial de novo* in the guardianship proceeding.[1] The filing of this petition constituted a general appearance and, if jurisdiction of the person be necessary, *the District Court had jurisdiction of his person* as well as of his estate. *Glass* v. *Smith*, 66 Tex. 548, 2 S. W. 195. Therein the Supreme Court of Texas said:

> "* * * A court acquires jurisdiction over a plaintiff by his voluntary submission of a real or supposed cause of action to its determination; and, in this respect, one who institutes proceedings for the purpose of having reviewed by another court some proceedings

1. Rule 350, Texas Rules of Civil Procedure, under heading, "Certiorari to County Court," provides: "The cause shall be *tried de novo* in the District Court, but the issues shall be confined to the grounds of error specified in the application for the writ. The judgment shall be certified to the County Court for observance."

had in an inferior court, is held thus to give to the court, exercising appellate or revisory power, *jurisdiction over his person.* * * *" (pp. 195-196)

In *Perry* v. *Rohde,* 20 Tex. 730, it was held that a defendant who was not properly cited in the justice court, but who filed a petition for certiorari in the County Court, *conferred jurisdiction on the County Court to enter a personal judgment on a trial de novo.* See also *Perry* v. *McKinzie,* 4 Tex. 154; *Sheldon* v. *San Antonio,* 25 Tex. Supp. 177; *Wilson* v. *Fisher,* (Civ. App.) 105 S. W. (2d) 304; *Heavey* v. *Castles,* (Civ. App.) 12 S. W. (2d) 615 (writ refused); and *Thomason* v. *McGeorge,* (Com. App.) 285 S. W. 285.

The courts of Kentucky, like Texas, treat the appearance of a party in the appellate court where a *trial de novo* is had as curing lack of service of process in the courts below, and, in *Western Life Indemnity Company* v. *Rupp,* 235 U. S. 261, 59 L. ed. 220, this Court held that such practice does not violate the due process clause of the Fourteenth Amendment. Likewise, in *York* v. *Texas,* 137 U. S. 15, 34 L. ed. 604, this Court held that a *personal judgment* rendered on a *void out of state service* of process was valid where the defendant made a special appearance to attack the court's jurisdiction, since under the laws of Texas such special appearance constitutes a general appearance for all purposes and gave the court jurisdiction of defendant's person. It was held that such law did not violate the Fourteenth Amendment.

Petitioner contends either (*1*) there must be a prior adjudication of insanity *or* (*2*) there must be jurisdiction of the person. We submit that even under petitioner's erroneous interpretation of the law both requirements were present and that therefore no constitutional question exists in this case.

Point II.

The Texas Statute which provides for the determination of the insanity of a nonresident person for the purpose of appointing a guardian of his Texas estate does not contravene the due process provision of the Fourteenth Amendment.

Petitioner contends that the courts of Texas were without power to adjudicate Hugh Henderson insane as an incident to the appointment of a guardian of his Texas estate and that the statute authorizing such appointment violates the Fourteenth Amendment. (Specification of Error A, brief 17.)

Section 2323, Code of Civil Procedure of New York (1898), is similar to the Texas statute which petitioner attacks. The New York statute provides for the appointment of a committee of the estate of a nonresident incompetent. *In re Paddock,* (Ct. App. N. Y.) 97 N. E. 1111, involved the constitutionality of this statute. In answer to the following certified question:

> "(1) Is Section 2323 of the Code of Civil Procedure violative of the state or Federal Constitution in so far as it permits the maintenance of an incompetency proceeding against a nonresident of the state having property situate in the state?"

the Court of Appeals of New York held that the statute did not violate either the State or the Federal Constitution. The constitutionality of this *identical statute* was likewise sustained by this Court in *Chaloner* v. *Sherman,* 242 U. S. 455, 61 L. ed. 427. Chaloner was a resident of Virginia and had *not* been adjudicated incompetent by a court of that state, but nevertheless this Court in holding that the courts of New York had jurisdiction to determine the insanity of

this nonresident for the purpose of appointing a committee of his estate said:

> "As the plaintiff had notice and opportunity to be heard at each stage of these proceedings, the essential elements of due process of law were fully met, and *the court had jurisdiction to enter that order.* * * *" (p. 461)

There is no substantial difference in the facts involved in the *Chaloner* case and in the case at bar, except that there had been no prior adjudication by a Virginia court in the *Chaloner* case, whereas a Missouri court had declared Hugh Henderson insane in 1908 (R. 35). Chaloner was in the State of New York at the time he was adjudicated incompetent and a committee appointed and was personally served, although such personal service was not required by the statute. Likewise, Hugh Henderson was personally served in Missouri, although such personal service was not required by the statute. Concededly, this out of state service on Hugh Henderson was effective only as a constructive service. However, it had the desired result since it brought Hugh Henderson to Texas and he was present in the courtroom at the time he was found to be insane and the guardian of his Texas estate was appointed. (R. 60) On the other hand, Chaloner was not present in the courtroom when he was adjudicated insane and the committee was appointed for his estate. The *Chaloner* case does not discuss the question of whether constructive service is sufficient in a guardianship proceeding. We will submit other authorities on that point. However, the *Chaloner* case does expressly hold that a statute similar to Article 4132, Revised Texas Statutes, providing for the adjudication of insanity of a nonresident person and the appointment of a guardian of his Texas estate, does not violate the Federal Constitution.

a. *A proceeding brought for the appointment of a guardian of the Texas estate of a nonresident person of unsound mind is an action in rem or quasi in rem and constructive service constitutes due process of law.*

Petitioner's primary contention appears to be that the Courts of Texas could not appoint a guardian for his Texas estate without obtaining personal service upon him (brief 17). The mere statement of this proposition reveals its impracticability. Being a nonresident, it was impossible to obtain personal service upon him in the State of Texas. Under petitioner's theory his Texas land must remain without a manager of any type. Petitioner being insane, he could not make contracts relating thereto; his Missouri guardian had no jurisdiction outside the State of Missouri; and any process issued from a Texas court is ineffective outside that state's borders. This means that during the past 30 years Hugh Henderson's Texas land could not have been leased by anyone for agricultural or any other purpose. This cannot be the law, and, as we shall now show, it is not the law.

Herein we shall assume, arguendo, there was no prior adjudication of insanity in Missouri and no jurisdiction of petitioner's *person* by either the County Court or the District Court of Clay County, Texas. Petitioner's entire argument is based on the theory that a proceeding for the appointment of a guardian is an insanity hearing. Such is not the case. While insanity is one of the facts which must be determined, *the primary purpose of the action is to appoint a guardian of the estate of the nonresident person of unsound mind.*

The Court of Civil Appeals, in its opinion in this case (R. 71) 202 S. W. (2d) 492, very concisely states the basic error in petitioner's argument in the following language:

"The basic error in appellant's contentions, both as to the jurisdiction of the Texas court to appoint a guardian and as to the question of personal service on Hugh Henderson, is the failure to treat the guardianship as a proceeding *in rem* rather than as a proceeding in personam. *The primary purpose of the guardianship proceeding was* not to have the County Court of Clay County adjudge the status of the nonresident Hugh Henderson, but *to have that court exercise control of property lying within its jurisdiction.*" (R. 77)

In its opinion in this present case the Supreme Court of Texas said:

"It is our further view that due process within the meaning of the 14th Amendment to the Constitution of the United States was observed in the proceeding. *Jones* v. *Pairie Oil Co.*, 273 U. S. 195; *McKinley* v. *Salter* (Civ. App.), 136 S. W. (2d) 615 (writ dismissed, correct judgment). *Such a proceeding is one in rem or quasi in rem. McCormick* v. *Blaine,* 178 N. E. 195, 77 A. L. R. 1215; *Re Sall,* 59 Wash. 539, 140 Am. St. Rep. 885; *Wallace* v. *Tinney,* (Iowa) 122 N. W. 936. *In a proceeding of that nature the court may acquire jurisdiction by means of substituted or constructive service. Pennoyer* v. *Neff,* 95 U. S. 714; *Re Sall, supra;* case note 77 A. L. R. 1227. A contrary holding would have the effect of depriving the courts of this State of control over lands situated within its borders." (R. 92)

The question of whether or not in Texas the appointment of a guardian for a nonresident person of unsound mind is an *in rem* or *quasi in rem* action is important for the reason that *personal service of process is not required in an action in rem or quasi in rem.* 34 C. J. 1172; 42 Am. Jur. 71.

"• • • a valid judgment in rem, or quasi in rem, may be rendered which will be binding on property within the jurisdiction of the court without personal service of

process, substituted or *constructive service being sufficient to constitute due process in such cases.* • • •" (16 C. J. S. 1246-7)

Since the guardianship proceedings concerned petitioner's Texas property and nothing more, under the laws of Texas such proceedings were in rem or quasi in rem and constructive service complied with the due process provision of the Fourteenth Amendment.

In *Jones* v. *Prairie Oil & Gas Company*, 273 U. S. 195, 71 L. ed. 602, in holding that the appointment of a guardian for a minor on *constructive notice* did not violate the due process provision of the Fourteenth Amendment, this Court said:

"• • • The Oklahoma statutes only require such notice as the judge deems reasonable to be given to the relatives residing in the county and to any person having the care of such minor. Okla. Comp. Stat. 1921, Sec. 1431. In the circumstances stated, unqualified, the requirement of notice is merely formal, if it exists. *Lester* v. *Smith*, 83 Okl. 143, 200 Pac. 780; *Gibson's Appeal*, 154 Mass. 378, 379-381, 28 N. E. 296. *Certainly there is nothing in the Constitution of the United States that requires it.* • • •" (p. 198)

Petitioner attempts to distinguish this case on the ground that it involved the appointment of a guardian of an admitted minor. Likewise, the case at bar involves the appointment of an admitted insane person, but the question now under discussion is not whether a particular person is an admitted minor or an admitted insane person, but what type of notice is required to appoint a guardian. The Fourteenth Amendment applies to minors as well as to adults. If personal service is necessary before appointing a guardian for a person of unsound mind, then we submit that personal service is necessary before appointing a guardian of

a minor. As was said by the Court of Appeals of Kentucky in *Hundley* v. *Sumrall,* 144 Ky. 73, 137 S. W. 842:

> "We do not see that the case of a lunatic can be distinguished from that of an infant." (2 c. 844)

Petitioner makes no attempt to distinguish *Cunnius* v. *Reading School District,* 198 U. S. 458, 49 L. ed. 1125, and *Blinn* v. *Nelson,* 222 U. S. 1, 56 L. ed. 65. These two cases *did not involve minors.* Each case involved an *adult nonresident,* but nevertheless this Court held that the appointment of an administrator for the estate of these living adult absentees *on publication notice did not violate the Fourteenth Amendment.* Cunnius, who had resided in California for more than seven years, returned to Pennsylvania and sued the Reading School District to recover money paid by it to the administrator. In holding that *publication notice was sufficient and that the statute did not violate the Fourteenth Amendment,* this Court said:

> "• • • As it cannot be denied that, in substance, the Pennsylvania statute is *a special proceeding* for the administration of the estates of absentees, distinct from the general law of that state providing for the settlement of the estates of deceased persons, and as, by the express terms of the statute, jurisdiction was conferred upon the proper court to grant the administration, it follows that the Supreme Court of Pennsylvania *did not deprive the plaintiff in error of due process of law within the intendment of the 14th Amendment.* • • • (p. 476)
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> "• • • Let it be further conceded, as we also think is essential, that a state law which did not provide adequate notice as prerequisite to the proceedings for the administration of the estate of an absentee would also be repugnant to the 14th Amendment. • • • So far as

the *notices* which it directs to be issued, we think they *were reasonable.* * * *" (p. 477)

The notices which this Court held "were reasonable" were publication notices. See also *McKinley* v. *Salter,* (Civ. App.) 136 S. W. (2d) 615, (writ dismissed—judgment correct) wherein it was held the appointment of a temporary guardian without notice did not violate the Fourteenth Amendment. This Court dismissed the appeal "for want of a substantial Federal question." 312 U. S. 659, 85 L. ed. 1106.

We do not see how petitioner can contend an act providing for the appointment of a guardian for a nonresident sane person on constructive notice is valid but that a different rule is applicable to a nonresident insane person. We respectfully submit that since the appointment of a guardian of the estate of a minor or an absentee *adult sane* person on constructive notice does not violate the Fourteenth Amendment, the appointment of a guardian of the estate of a nonresident person of unsound mind on constructive service is constitutional. The cases which we shall hereafter discuss so hold.

Our discussion is limited to *guardianship of estates* and cases relating to guardianships of persons are not apropos. The reasoning back of all cases providing for the appointment of a *guardian of the estate* of a minor or of a person of unsound mind on constructive notice is that the appointment of a guardian is not an adversary proceeding but partakes of the nature of an action by the state in its character of parens patriae; that it does not take the ward's property, but uses it for his benefit. *In re Prokosch's Guardianship,* (1915) 128 Minn. 324, 151 N. W. 130; *Shroyer* v. *Richmond,* (1866) 16 Oh. St. Rep. 455, 465; *Hughes* v. *Jones,* (1899) 116 N. Y. 67, 22 N. E. 446; *Whittelsey* v.

Conniff, 266 Mo. 567, 182 S. W. 161, 1 A. L. R. 913; *McKinley* v. *Salter*, (Civ. App. Tex.) 136 S. W. (2d) 615 (writ dismissed—judgment correct); 39 C. J. S. 36.

In 1751, nearly 200 years ago, this question was first submitted to the courts of England, and it was held that a commission of lunacy could issue against a person *residing in France. Ex Parte Southcote*, 1 Amb. 109, 27 Eng. Rep. 71. While the type of notice is not shown, it necessarily was constructive. *Such was the statuts of the common law when it became the basic law of the United States.* This case has been cited innumerable times by the courts of this country. It has also been followed by the English courts. *In re Lanwarne*, 30 W. R. 759, 46 L. T. 668, is another English case involving the lunacy of an alleged lunatic residing abroad. The court made an order dispensing with the presence of the lunatic and *notice was given by a registered letter.*

The first reported case we have been able to find in the United States on this point was decided in 1816. *Matter of Perkins*, 2 Johns. Ch. 124, 1 N. Y. Ch. Rep. (L. ed.) 317. Therein the New York court stated:

> "• • • It is, at least, sufficient to warrant the issuing a commission; and there is no doubt, from the case *Ex parte Southcote*, Amb. 109, that a commission of lunacy may issue against a person resident abroad." (2 c. 317)

The *Perkins* case involved a person who had already been adjudicated insane in the state of his residence, but the New York court held it could not recognize that adjudication but would have to make its own.

The next case in point of time was decided in 1830. *Re Petit, a Lunatic*, 2 Paige 174, 2 N. Y. Ch. Rep. (L. ed) 861. The alleged lunatic was a resident of Connecticut and *there had been no prior adjudication of insanity.* The court

ordered that a commission to determine the question of insanity and necessity for a committee of his New York estate should issue in the New York county closest to his Connecticut residence, *on out of state notice.*

The *Perkins* and *Petit* cases were followed in 1842 by *Re Ganse, a Lunatic,* 9 Paige Ch. 416, 4 N. Y. Ch. Rep. (L. ed) 756. In this case the exact whereabouts of the alleged lunatic was unknown and the question before the court was whether it could issue a commission of lunacy for the purpose of appointing a committee of his estate without some evidence that the lunatic was within the jurisdiction of the court. In determining that it could the court said:

> "* * * It was at one time questioned whether the Lord Chancellor of England could issue a commission where the lunatic was abroad. But since the decision of Lord Hardwicke, in *Southcote's* case, 2 Ves. Sr. 402, *there can be no doubt of the right of the chancellor to issue a commission, where the lunatic has lands within his jurisdiction, although the lunatic is himself domiciled abroad.* And the cases of *Perkins* (2 Johns. Ch. 124) and of *Petit* (2 Paige 174) established the same principle here. * * *" (1 c. 757)

In determining that notice to the lunatic could be given *by mail,* the court said:

> "A commission must issue accordingly, as prayed in the petition, and must be executed in the town of Fishkill; * * * *The commissioners must also direct a similar notice to be transmitted to Ganse himself, through the postoffice,* directed to him at Batavia, at least twenty days previous to the time when the commission is to be executed." (1 c. 757)

Re Russell, a Lunatic, (1845) 1 Barb. Ch. 38, 5 N. Y. Ch. Rep. (L. ed.) 290, was another action to determine lunacy and appoint a committee. The court held that while

reasonable notice should be given *personal service upon the alleged lunatic was not necessary.* (l. c. 291.) There are many more New York cases of a similar nature, the more recent of which had under consideration a nonresident statute similar to the Texas statute. *In re Dalrymple,* 163 N. Y. S. 233, and *In re Ryan,* (1943) 40 N. Y. S. (2d) 594. *In re Paddock,* (Ct. App. N. Y., 1912) 97 N. E. 1111, attacked the nonresident statute on the ground that it violated the State and Federal Constitutions. *The constitutionality of the statute was upheld.*

New Jersey likewise followed the common law. *In the Matter of Child,* 16 N. J. Eq. 498; *In re Devausney,* 56 N. J. Eq. 502, 28 Atl. 459. In the *Devausney* case the jurisdiction of the court to institute proceedings de lunatico inquirendo was challenged on the ground that, although the lunatic had real and personal estate in New Jersey, she was a citizen and resident of New York. (1 c. 459) This case has an excellent discussion of the early cases in this country and also of the English case of *Ex parte Southcote, supra.* After discussing these cases the court said:

> "This examination of the law and case, in my judgment, demonstrates that *In re Southcote* is an authority for issuing a commission when the alleged lunatic is nonresident, if he or she owns an estate within the jurisdiction. * * *" (2 c. 460)

The New Jersey cases are of special significance for the reason that the New Jersey nonresident statute provides that prior to the appointment of a New Jersey guardian by the Orphans Court there must be an adjudication of insanity in the state of the insane person's residence; but nevertheless the above cases hold that the Court of Chancery has an inherent power to protect the property of insane persons and, in those cases where a nonresident has not been

declared insane in the state of his residence, a court of chancery may intervene to determine such insanity and appoint a guardian of his estate.

The courts of Delaware likewise have passed upon this question. *In re Wilson,* (Ct. of Chan. of Dela., 1912) 82 Atl. 695, adjudicated a nonresident to be a person of unsound mind and appointed a guardian of his estate *on out of state service.* The court said:

> "It is clearly settled that a court of chancery has, *independent of statute,* jurisdiction to issue a commission de lunatico inquirendo respecting a person who has real estate within the jurisdiction of the court, though he be a nonresident. * * *" (1 c. 696)
>
> * * * * * * * *
>
> "So also *as to the matter of notice* to the alleged lunatic, which, of course, is very important. Inasmuch as there is no rule or statute prescribing the form or method of giving notice it can be given in such way that the chancellor will be sure that the supposed lunatic, if in such condition that a notice will be proper and useful, has knowledge of the proceeding, *though living in another jurisdiction.*" (2 c. 696)

The Supreme Court of Washington had this question before it in *Coleman* v. *Cravens, et al.,* (1905) 41 Wash. 1, 82 Pac. 1005, and, in sustaining a determination of insanity and the appointment of a guardian of the estate of a nonresident on *publication notice,* the court said:

> "* * * This application falls under Section 5 of said act, and the *notice by publication* is manifestly the only notice required in such cases. * * *" (1 c. 1006)

In each of the cases cited below *it was held that a nonresident could be determined to be insane for the purpose of appointing a guardian of his estate.* In many cases the

type of notice is shown, but even where not shown it had to be constructive, since in each case the insane person was outside the state and personal service of process was impossible. *In re Sall,* 59 Wash. 539, 110 Pac. 32 (*publication notice*); *Hundley* v. *Sumrall, et al.,* 144 Ky. 73, 137 S. W. 842 (*notice by mail*); *McCormick* v. *Blaine,* 345 Ill. 461, 178 N. E. 195 (*notice by publication and mailing*); *Wallace* v. *Tinney,* 145 Ia. 478, 122 N. W. 936 (*no notice necessary*); *In re Edgerly,* 82 Minn. 96, 84 N. W. 653 (*notice by mailing*); *Appeal of Karmany,* 242 Pa. 300, 89 Atl. 84; *Griffin* v. *Larwell,* 148 Mich. 516, 111 N. W. 1089; *In re Hendrickson,* 40 S. D. 211, 167 N. W. 172 (*constructive notice*); *Crohn* v. *Modern Woodman of America,* 145 Mo. App. 158, 129 S. W. 1069 (Secs. 386 and 482 Mo. Stats. Ann., require "reasonable notice" in such cases); *Coker* v. *Gay,* 154 Ga. 337, 114 S. E. 217; *Henderson* v. *Shell Oil Company, Incorporated,* (Tex. Sup.) 202 S. W. (2d) 492 (R. 89, 92) (*constructive notice is sufficient*); *Finley* v. *Hartsook,* (C. C. A. 5) 158 F. (2d) 618 (*in rem action. Personal service not necessary*); *Josephberg, et al.,* v. *Markham,* (C. C. A. 2) 152 F. (2d) 644 (*living in Italy*). Even before the passage of the statute providing for the appointment of guardians for nonresidents the Supreme Court of Texas held that under the Constitution the courts of that state had jurisdiction to appoint such guardians. *Neal* v. *Bartleson,* 65 Tex. 478.

> "*Insanity Is Not a Status.* If insanity is found at the domicile it does not affect the condition of the person in another state; if he is to be treated as insane in the other state, he must there be found insane. So a person found sane at his domicile may be found insane in another state. *A person may be declared insane in a state not his domicile, and there put under guardianship.*" Conflict of Laws by Beale, Vol. 2, page 658, Sec. 120.9.

"* * * But the power of chancery courts, in the absence of statutory provisions on the subject, *to institute proceedings de lunatico inquirendo* in the case of *nonresident persons* of unsound mind, *and to appoint guardians* to them after inquisition, is well established in England and America, provided that such person has real or personal estate within the jurisdiction of the court. * * * No committee can be appointed of the person of a non-resident, but a committee may be appointed to administer a non-resident's property." The American Law of Guardianship by Woerner, p. 441, Sec. 134.

See also: Rights, Remedies and Practice, by Lawson, Vol. 2, Sec. 848, "Guardians of Lunatics," and American and English Enc. of Law, Vol. 16, pp. 577-578, Sec. 9.

On the question of whether it first must be adjudicated that a nonresident is incompetent, the author, in 14 R. C. L. 570, Sec. 21, says:

"* * * So it has been declared that while the fact of the insanity of a non-resident for the protection of whose property the appointment of a guardian is sought must be judicially determined, this may be done on the hearing of the application for the appointment of the guardian, and need not be determined in an independent proceeding."

See also, 32 C. J. 653, and 25 Am. Jur. 21.

By case law or by statutes most of our states have followed the common law and provide for the appointment of guardians of the estates of nonresident persons of unsound mind upon constructive notice, and, as an incident thereto, for a determination of insanity. *In no case has the highest court of any state held that such appointment could not be made on constructive notice under proper statutory authority,* and several courts have held the insanity of a non-

resident can be determined and a guardian appointed *on constructive notice* even in the absence of express statutory authority. *Ex parte Southcote,* (England) 1 Amb. 109; *Re Ganse, a Lunatic,* 9 Paige 416, 4 N. Y. Ch. Rep. (L. ed.) 756; *In the Matter of Child,* 16 N. J. Eq. 498; *In re Wilson,* 9 Del. Ch. 332, 82 Atl. 695; and *Coker* v. *Gay,* 154 Ga. 337, 114 S. E. 217.

In his argument petitioner cites cases from eleven different jurisdictions. *Nine of these jurisdictions have nonresident statutes similar to Texas. These statutes provide for the appointment of guardians or custodians of the estates of nonresident persons of unsound mind without requiring personal service of process.*[1] The two states that do not have a statute similar to the Texas nonresident statute are Louisiana and West Virginia, and the cases cited from these states are not in point on the constitutional question here involved. Most states have two sets of guardianship statutes—one set relating to guardians of *resident* minors and persons of unsound mind, *which expressly require personal service of process;* and another set relating to the appointment of guardians of the estates of *nonresident* minors and persons of unsound mind, which statutes provide for constructive notice. Not a single nonresident statute of any state in the United States provides for personal service. Six of the cases cited by petitioner involve appointments of guardians for *residents* under statutes *expressly providing for personal service of process.* These cases merely hold that *where required by statute* such personal service is necessary. Only two of petitioner's cases involve the appointment of a guardian of the *estate of a*

1. Article 4132, *Tex.* Rev. Civ. Stat.; Code of *Iowa* 1939, Sec. 12605; *Cal.* Code of Civ. Procedure 1923, Sec. 1793; 58 *Okla.* Stats. 1941, Sec. 861; *Alaska* Code, Sec. 911; Sec. 59-1803, 1947 Supp. to Gen. Stats. of *Kansas* 1935; *Pa.* Stats. 1920, Sec. 14367; *Minn.* Stats. 1941, Sec. 525.55; *District of Columbia*—Cooper v. Burton, 127 F. (2d) 741 (2 c. 742).

nonresident person of unsound mind. Those two cases are *Redmon* v. *Leach,* (Civ. App. Dallas, Tex.) 130 S. W. (2d) 873, and *Grinbaum* v. *Superior Court,* 192 Cal. 548, 221 Pac. 635. *Redmon* v. *Leach* was repudiated by the Supreme Court of Texas in the case at bar. The California nonresident statute involved in *Grinbaum* v. *Superior Court* provided for *such notice as the "court deems reasonable."* The court merely held that such statute required some type of notice and that the appointment of a guardian *without any notice whatever* was invalid. That case is not applicable here because the Supreme Court of Texas has held that notice in the case at bar was properly given under the Texas statutes. *Petitioner's cases are more fully discussed in an appendix to this brief.*

Point III.

Upon the filing of the petition for the appointment of a guardian the County Court of Clay County, Texas, acquired jurisdiction of petitioner's Texas estate.

Under Specification of Error B (brief 17) petitioner asserts that for a constructive service to be sufficient there must be a prior seizure of his property. Petitioner overlooks the fact that *upon the filing of the petition for guardianship the County Court obtained jurisdiction of petitioner's property within the State of Texas. Wootters* v. *Wynne,* (Civ. App. Tex.) 7 S. W. (2d) 940 (no writ), involved an application for appointment of a guardian for a person of unsound mind. After the application had been filed, but before it had been passed upon, the County Court of Houston County declared Eastham insane and appointed a guardian on a complaint filed subsequent to the filing of the complaint in Walker County. In holding that the County Court of Walker County, in which the first complaint was filed,

acquired jurisdiction of the insane person's estate upon the filing of such complaint, the court said:

> "The purpose of Mrs. Jones' application was to *subject the property of W. A. Eastham's estate to the custody and control of the probate court of Walker County, and its jurisdiction attached when such application was filed,* • • • The Walker County Court having first acquired *jurisdiction of the property* belonging to the estate of W. A. Eastham by the due commencement of a proceeding, which it was empowered to adjudicate, *and which sought to have the court seize and exercise dominion over such property,* it was entitled to exercise its jurisdiction without interference from any other court of co-ordinate jurisdiction, • • •." (2 c. 941)

Identical contentions were made by the petitioner in *Cunnius* v. *Reading School District,* 198 U. S. 458, 49 L. ed. 1125, discussed above. In that case *it was contended* that under *Pennoyer* v. *Neff,* 95 U. S. 714, 24 L. ed. 565, first, *personal service was necessary* before appointing an administrator for a living absentee, and, second, the *publication notice* provided for by the statute *was insufficient under the Fourteenth Amendment*: "• • • for the reason that there was *no seizure of plaintiff's property* into the custody of the court prior to the rendition of the decree • • •." *It was further contended* that, "It follows, therefore, that for want of personal notice to the plaintiff, and *in the absence of the required seizure of her property,* the proceeding under the Act of 1885 was void as to her, • • •." (2 c. 49 L. ed. 1126.) *In overruling both these contentions* and in holding that the *publication notices* provided for by the statute were sufficient, this Court said:

> "• • • So far as the notices which it directs to be issued, we think they were reasonable. • • •" (p. 477)

Conclusion.

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX.

Petitioner's Authorities Do Not Support His Contention.

Pennoyer v. *Neff*, 95 U. S. 714, 24 L. ed. 565, merely holds that a personal judgment by an attorney for services rendered could not be obtained against a nonresident upon constructive service of summons by publication in an action where he did not appear. Therein this Court expressly recognizes the validity of constructive service of process *in actions in rem or quasi in rem.* What constitutes seizure of property is discussed under Point III, *supra.*

Redmon v. *Leach*, (Civ. App. Dallas) 130 S. W. (2d) 873: In his brief petitioner asserts that the Supreme Court of Texas expressly approved the holding of the Court of Civil Appeals in *Redmon* v. *Leach*, but such is not the case. Regardless of whether the Texas statute is or is not constitutional, the correct result was reached in the *Redmon* case, since an attempt was being made to deprive Redmon, *a sane person*, of her property by having her declared insane. In addition to the constitutional question the court found the posted notice was insufficient and that *in fact Redmon was not a person of unsound mind.* The Supreme Court of Texas in denying a writ of error did not approve the questions of law decided by the Court of Civil Appeals, but merely held that it had rendered a correct judgment. The San Antonio Court of Civil Appeals in *In re Burges' Estate*, 148 S. W. (2d) 903 (no writ), and the Fort Worth Court of Civil Appeals in the case at bar, *Hugh Henderson* v. *Shell Oil Company, Incorporated, et al.*, 202 S. W. (2d) 492 (R. 72, 76), each refused to follow the *Redmon* case and the Supreme Court of Texas likewise refused to follow the Redmon case in the case at bar. (R. 89)

The type of notice required in a guardianship proceeding is entirely dependent upon the statute under consideration. In nearly every state there are two sets of statutes. One set relates to the appointment of a guardian for a *resident* person of unsound mind, and for the most part *these statutes require personal service of process* upon the alleged insane person. The other set of statutes relates to the appointment of a guardian for a *nonresident* minor or person of unsound mind, and in some instances for a resident minor or person who is absent from the state. *Without exception these statutes either do not require notice or provide for constructive notice.* The reason is obvious. Constructive service is a creature of necessity and, except in rare instances, it would be impossible to procure personal service on a nonresident person of unsound mind. In considering each case it must be determined whether the statute being construed expressly provides for personal service of process or permits constructive notice.

Many of the cases cited by petitioner involve cases construing statutes which *expressly require personal service. Raher* v. *Raher,* 150 Ia. 511, 129 N. W. 494, upon which petitioner so strongly relies, is this type of case. *It construes a resident statute which expressly requires personal service.* Under that statute an attempt was made to obtain *personal service on a resident* while out of the state. *The court held such service was not authorized by the statute.* On the other hand, *Wallace* v. *Tinney,* (1909) 145 Ia. 478, 122 N. W. 936, involved the Iowa nonresident statute. Therein the Supreme Court of Iowa, in approving the appointment of a guardian of the Iowa estate of a resident of Oregon who was of unsound mind, held that such action was *in rem* and that such appointment *could be made without notice.* The court said:

"* * * The exhibits referred to are the application

for appointment, the report of the guardian, and the order of court thereon, and the order appointing the guardian. These do not show that no notice was given. But we do not think that either the statute or any rule of constitutional law requires the giving of notice of an application for the appointment of a guardian of the property of a nonresident. Surely our statute does not require any notice, and, if it be required, it must be in virtue of some general rule of law or constitutional requirement. Doubtless no guardian may be appointed for the person of another without notice, and this is what the cases for appellant seem to hold. * * *" (1 c. 938)

Petitioner attempts to avoid *Wallace* v. *Tinney* on the ground the opinion in the *Wallace* case was prior to the opinion in the *Raher* case. In making this argument petitioner overlooks these facts: (*1*) The cases construe two separate and distinct statutes—the resident statute, which requires personal service, and the nonresident statute, which does not require personal service, and (*2*) the personnel of the court handing down the decision in the *Wallace* case was identical with the personnel of the court handing down the decision in the *Raher* case. The same Iowa statute covers both nonresident minors and persons of unsound mind and as late as 1941 the Supreme Court of Iowa again had this nonresident statute before it in approving the appointment of a guardian for a minor resident of Texas who was in Nebraska when the application for guardianship was made. *In re Skinner's Guardianship,* 230 Ia. 1016, 300 N. W. 1. While the type of service is not shown, it had to be out of state. In this case the court held the lower court was without jurisdiction to appoint a guardian of the nonresident's person *but affirmed the appointment of a guardian of his estate.* Both the statute and case law of Iowa refute petitioner's contention.

Grinbaum v. *Superior Court*, 192 Cal. 528, 221 Pac. 635: Petitioner's quotation from this case must have been taken from some digest, since we fail to find all of his quotation in the opinion as reported in the Pacific Reporter. A part of it will be found in column 1, page 646. Although the last sentence of this quotation is shown as a part of the previous paragraph, it is not so shown in the opinion. This case involved the appointment of a guardian for an insane *resident* of California who was in Germany at the time. *No notice of any kind was given.* In stating that it was not necessary to decide whether the action was in personam or in rem and whether a substitute notice would be sufficient, the Supreme Court of California said:

> "* * * In so doing *we do not deem it necessary to determine* whether proceedings for the appointment of guardians of the estates of insane or incompetent persons are proceedings in personam or in rem; * * *, *the question here is not as to the form or sufficiency of the notice, but is as to whether or not any notice whatsoever was given,* or is to be presumed to have been given; * * *." (1 c. 641)

A reference to that portion of the opinion quoted in petitioner's brief reveals that the court was discussing two different sections of the statute. In the first part of the quotation it discusses Section 1763, which provides for *personal service* of notice where *residents* within the state are involved. The court then states:

> "Section 1793 of the Code of Civil Procedure provides for the appointment of guardians of *insane* or incompetent persons *who reside or are without the State* of California. * * *." (1 c. 640)

That is the reason the court in the quotation cited in petitioner's brief states that personal service is required under

Section 1763 (the resident statute), but that *"a similar strictitude cannot be practicably enforced in the case of alleged insane or incompetent persons who reside without* or are absent from *the state* lies in the nature of things, but does not in any degree diminish the importance of giving the notice required by Section 1793 of the Code of Civil Procedure." (1 c. 646) *The notice required by Section 1793 is not personal notice, but is such notice as the "court deems reasonable."* In other words, the *Grinbaum* case holds that *by statute* personal service is necessary where a resident within the state is involved, but that where a resident is absent from the state or a nonresident is involved, "a similar strictitude cannot be practicably enforced" (that is, personal service) and therefore Section 1793 is applicable. Section 1793 is shown in full in column 1, page 640 of the *Grinbaum* case. *This section applies alike to the appointment of a guardian for a nonresident minor or insane person, and the same notice is required in each case.* In *Gronifer* v. *Puymirol,* 19 Cal. 629, the Supreme Court of California approved the appointment of a guardian for an infant citizen and *resident of France,* and held that *service by publication for five days complied with the nonresident statute.* Both the statute and case law of California refute petitioner's contention.

In re Allie Walters Sacks, (Cal.) 190 P. (2d) 602, and *Sacks* v. *Superior Court,* 79 Cal. App. (2d) 806, 180 P. (2d) 922: Petitioner in his brief erroneously states that these two cases hold that an insanity hearing based on foreign service and publication service is insufficient and the entire proceedings are null and void because of lack of personal service (brief 25). *Neither case so held.* The same incompetent was involved in each case. *These cases involved the resident statute above referred to.*

McElroy v. *Pegg,* (C. C. A. 10) 167 F. (2d) 668: This is a case similar to the Iowa case. *It involves a resident statute expressly providing for personal service.* It will be noted from the quotation in petitioner's brief that 58 Okla. Stats. 1941, Sec. 851, expressly provides that *where a resident is involved notice* of the time and place of the hearing for the appointment of a guardian for a person of unsound mind *must be personally served.* Under such statute a proceeding had without such personal service is invalid. The Oklahoma cases cited in the quotation from the *McElroy* case all merely hold that *under this statute* personal service is necessary. On the other hand 58 Okl. Stats. 1941, Sec. 861, relates to the appointment of guardians for *nonresident* minors and *persons of unsound mind, and provides for notice "in such manner as the judge orders."* Again we find that in Oklahoma, like in California and Iowa, personal service is required where a resident within the state is involved, but that *where a nonresident is involved constructive service* may be had in such manner as the judge orders. While Section 861 has not been construed by the Oklahoma courts, Section 761, which relates to the appointment of guardians of minors, provides for "such notice as he (the judge) deems reasonable." Under this section it has been held that *personal notice is not necessary,* but only such notice as the county judge deems reasonable. *Jones* v. *Prairie Oil & Gas Co.,* 273 U. S. 195, 45 Sup. Ct. 338, 71 L. ed. 602, *supra; Hawkins* v. *Tiger,* 163 Okl. 55, 20 P. (2d) 578; *Ross* v. *Wilson,* 95 Okl. 262, 218 Pac. 682.

Martin v. *White,* (C. C. A. 9) 146 Pac. 461: Petitioner's quotation from the opinion in this case is confusing. We are unable to find the first paragraph of his quotation anywhere in the opinion. The second paragraph appears to be the third paragraph of the syllabus in the Federal

Reporter, and the third paragraph appears to be the fourth paragraph of the syllabus in the Federal Reporter. It is probable that petitioner merely intended the first paragraph as a statement of the facts in the case and that the printer erroneously quoted it. Again we find petitioner confusing the statute applicable to residents with the statute applicable to nonresidents. Section 896 cited in the last paragraph of petitioner's quotation is quoted in the opinion of the court (p. 463). This section provides for the appointment of a guardian for a *resident* insane person after "notice to be given to the supposed insane person of the time and place appointed for hearing the case, not less than ten days before the time so appointed; * * *." (p. 463) In its opinion the court said:

> "From a careful examination of the various sections of the Code of Alaska, it plainly appears that the *validity* of the proceedings had in the present case before the commissioner *must be determined by the provisions* of Sections 895 and 896. * * *" (p. 464),

and then held:

> "* * * There was *no notice* given to White *in compliance with the provisions of the statute* under which the commissioner acted. *The 'public notice'* of the time and place of the hearing in a newspaper, or by posting a similar notice in three public places in the town of Fairbanks, *was not such a notice as the statute requires.* * * *" (p. 465)

The only question before the court in the *Martin* case was whether the personal service provided for in the case of a resident insane person had been given. On the other hand, Section 911 of the Alaska Code, quoted in full at page 463 of the court's opinion, provides for the appointment of a guardian for minors and *other persons* residing *without* the District, but who have estates therein *"after notice to all*

*persons interested, to be given in such manner as the Commissioner shall order * * *.*" Alaska, like California, Iowa, Oklahoma, and numerous other states provides for personal service of process where a resident is involved, but for some type of constructive notice where a nonresident is involved.

Evans v. *Johnson,* 39 W. Va. 299, 19 S. E. 623: This is another case where an attempt was made to appoint a committee for a *resident insane person without any notice whatever* to him. The case is based entirely upon an interpretation of a statute as shown from the following quotation:

> "* * * In *Lance* v. *McCoy,* 34 W. Va. 416, 12 S. E. 728, the opinion is expressed that such an appointment by a County Court *without notice, as required by Code,* c. 58, Sec. 34, is void. A re-examination of this question in this case has confirmed me in the view then expressed. * * *" (2 c. 623)

The question before the court was whether an appointment could be made *without notice* in the face of a statute requiring notice.

Cooper v. *Burton,* (Ct. App., D. C.) 127 F. (2d) 741: This case merely held that the District Court of the District of Columbia could not adjudicate the mental condition of a lunatic residing in New Jersey, *for the purpose of controlling properties located in New York.* The court expressly found that a receiver or custodian of the property of the incompetent located in the District of Columbia could be appointed. In this connection the court said:

> "* * * *Doubtless it is true that the courts of the District have power to grant protection to property of insane persons, wherever they may be at a particular time, if the property itself is located in the District of Columbia, but protection of property is not the object of this petition. Appellants are not interested in ob-*

taining the appointment of a receiver or custodian of the small amount of Mrs. Coopers property in the District of Columbia. They are seeking an adjudication of insanity and the appointment of a committee for the purpose of controlling properties located in New York, and this character of relief the courts of the District may not grant in the absence of personal service in the District of Columbia." (1 c. 743)

On rehearing the court expressly states there is nothing in the opinion foreclosing the appointment of a receiver or custodian of Mrs. Cooper's property in the District of Columbia. (2 c. 743) That is what happened in the case at bar. *The Texas guardianship was limited to petitioner's property within that state.*

Morrissey v. *Rodgers,* 137 Kan. 626, 21 P. (2d) 359, involved the question of whether a guardian of an insane person appointed by a Nebraska court was entitled to certain personal property located in Kansas. The Supreme Court of Kansas merely held that the trial court committed error in refusing to admit evidence on the question of whether the incompetent was a resident of Nebraska, since if he was not a resident of that state the appointment of a guardian *over his person* would be invalid. *No attack was made on the appointment of a guardian of his estate.*

Beeler v. *Beezley,* 126 Kan. 268, 267 Pac. 1112, involves the *interpretation of a Kansas statute* which limited the jurisdiction of the probate courts of that state in appointing guardians *"to anyone in its county."* The court merely held that *under such statute* the probate court did not have jurisdiction of *any person outside the county* in a guardianship proceeding. *Federal Trust Co.* v. *Allen,* 110 Kan. 484, 204 Pac. 747, is a Kansas case which was cited by petitioner below, but which has been omitted here for the reason, no

doubt, that this case approves a Nebraska appointment of a guardian of an insane person *on constructive notice.* The Nebraska appointment which was held valid by the Supreme Court of Kansas was based on *publication notice and out of state service.* In this connection the court said:

> "* * * *Notice* as provided by the statutes of Nebraska was given *by publication* to all persons interested, and a certified copy of the *notice was delivered* to Emily J. Weston on November 25, 1920, at the home of her stepson *in El Dorado, Kan.* * * *." (1 c. 748)

Prior to 1939 the Kansas nonresident statute provided that a guardian for a nonresident incompetent may be appointed only where he "has been adjudicated incompetent in the state of his residence," (Sec. 39-241 G. S. 1935) and in *Henry* v. *Edde,* (1938) 148 Kan. 70, 79 P. (2d) 888, the Supreme Court of Kansas held there was *no statutory authority* in Kansas for the appointment of a guardian for a nonresident incompetent prior to his adjudication as an incompetent in the state of his residence. In spite of the above statute Mr. Justice ALLEN wrote a vigorous dissenting opinion wherein he took the position that even in the absence of a statute the District Courts of Kansas had the inherent power to appoint a guardian of the estate of a nonresident incompetent. In this connection he said:

> "* * * Ordinarily one would expect to go to the probate court to appoint a guardian, but *our statutes* relative to probate courts *do not cover the situation of a non-resident, actually incompetent, but who has not been so adjudged,* owning property in this state, and our decisions clearly indicate the non-existence of a remedy for the situation in the probate court. Under such circumstances, the District Court with its inherent equitable powers over the estate of incompetents is the only forum to which resort may be had.

"It would be an astonishing hiatus in the law if real and personal property in this state, belonging to a non-resident incompetent, could not be protected from waste and spoilation.

"There is no doubt equity has full and complete jurisdiction over the persons and property of incompetents, where the jurisdiction has not been taken away by the statute." (2 c. 894)

The Legislature of Kansas hastened to correct this *"astonishing hiatus in the law"* and repealed the above section of the Kansas statute by a new probate code passed in 1939, *one year after the above opinion.* The new code omits the requirement that an incompetent must first be adjudicated as such in the state of his residence before a Kansas guardian may be appointed. Section 59-1803, 1947 Supp. to G. S. Kan. 1935. This statute not only is broad enough to include nonresident incompetents, but it expressly provides that a guardian may be appointed for a nonresident person of full age in the state of his residence providing he is a minor under the laws of the State of Kansas. There can be no question but that under the 1939 statute a probate court in Kansas may appoint a guardian of the estate of a nonresident infant or incompetent regardless of whether he has been so adjudicated in the state of his residence. No Kansas case can be cited as holding that an act similar to the Texas act under consideration is unconstitutional.

Hansell v. *Hansell,* (1892) 44 La. Ann. 548, 10 So. 941, is another case that must be considered in the light of the statutes being interpreted. When so considered, it supports our contention. The *Hansell* case did not involve the appointment of a guardian, but rather an action for the partition of certain land and the *appointment of a curator ad hoc.* The court held that under the laws of Louisiana a

curator ad hoc could not be appointed for an insane person prior to the time he had been interdicted, but that he must be presumed sane until he had been declared otherwise by a proper court in the state of his residence. Nevertheless, the partition sale was upheld on the ground that the alleged insane person was an absentee and, under the Louisiana law, *the curator ad hoc was properly appointed* on that ground regardless of whether he was sane or insane. If the Louisiana civil law rule be applied to Texas, Willard Gragg, petitioner's next friend, has no standing in this Court. The duties of a curator ad hoc are similar to those of a next friend or guardian ad litem, and *under the Louisiana rule the District Court of Clay County, Texas, was without jurisdiction to find that petitioner was a person of unsound mind for the purpose of appointing Willard Gragg his next friend in this case;* and since, unlike Louisiana, Texas does not have a statute providing for the appointment of a next friend for an absentee sane person, his appointment could not be supported on that ground. *Louisiana does not have a nonresident statute similar to the Texas statute.* As a matter of fact, in *State* v. *Servier,* (1914) 136 La. 45, 66 So. 392, the Supreme Court of Louisiana held that *the Louisiana statute* providing for the commitment of insane persons *did not include nonresidents within the state.* As evidence that the court based its decision on the statute rather than on any question of constitutional right, we quote the following language:

> "From the text of the law prescribing the form or order of commitment, *we think that the lawmaker intended to exclude nonresidents* and transients from the operation of the act. * * *" (pp. 392-393)

The Louisiana court does not purport to hold that a statute like the Texas statute would not be valid either under the

Constitution of Louisiana or the Federal Constitution. Both the Constitution and statutes of Texas provide for the appointment of guardians of nonresident persons of unsound mind.

McMullin v. *Commonwealth, etc.*, 261 Pa. 574, 104 Atl. 760, involved the interpretation of a Pennsylvania statute authorizing a guardian of a nonresident ward to remove property. In defining the issues the court said:

> "The issue as thus defined by the pleadings was a very narrow one, a pure question of law, and *confined to an inquiry as to the legislative intent* in the act of April 13, 1868, *supra*. * * *" (2 c. 761)

The Pennsylvania guardianship statute also applies to nonresidents. Pa. Sta. 1920, Sec. 14367. In *Appeal of Karmany*, 242 Pa. 300, 89 Atl. 84, the Supreme Court of Pennsylvania upheld the appointment of a guardian for a nonresident person of unsound mind who *was absent from the Commonwealth*, but had real estate therein. The type of notice is not shown, but *it necessarily was constructive.*

Minnesota v. *Probate Court*, 309 U. S. 270, 84 L. ed. 744, was an action for commitment of a person alleged to be a psychiatric personality. The constitutionality of the statute was upheld. *Minnesota has a nonresident statute similar to the Texas statute.* It provides, "notice shall be given in such manner and to such person as the court may determine." Minn. Sta. 1941, Sec. 525.55. The notice in *In re Edgerly*, 82 Minn. 96, 84 N. W. 653, was by *mail.*

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IN THE

Supreme Court of the United States

October Term 1948

No. 218

HUGH HENDERSON, Individually, and by J. WILLARD GRAGG, his Next Friend, *Petitioner,*

vs.

SHELL OIL COMPANY, INCORPORATED, W. L. MOUNT, ET AL., *Respondents.*

BRIEF AND ARGUMENT OF RESPONDENT W. L. MOUNT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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BRIEF AND ARGUMENT OF RESPONDENT W. L. MOUNT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

MAY IT PLEASE THE COURT:

At the threshold there is presented the question of whether the Petitioners' Application for Writ of Certiorari is entitled to be considered. The petition was not filed within three months after final judgment. The order granting an extension of time within which to file the petition was, as we understand the record, based upon an applica-

tion presented not by a party to the suit or any person having legal authority.

We discuss the propositions of law covering said matters under the following points:

I. The next friend having failed to file his petition for writ of certiorari within three months after final judgment, this court is without jurisdiction to consider such petition and it should be dismissed.

II. Hugh Henderson, being insane, cannot appear individually or appoint attorneys to appear in his behalf.

III. The obtaining of an extension of time within which to file a petition for writ of certiorari by a party not of record in the courts below does not extend the time within which the next friend could file his petition.

POINT I.

THE NEXT FRIEND HAVING FAILED TO FILE HIS PETITION FOR WRIT OF CERTIORARI WITHIN THREE MONTHS AFTER FINAL JUDGMENT, THIS COURT IS WITHOUT JURISDICTION TO CONSIDER SUCH PETITION AND IT SHOULD BE DISMISSED.

(All emphasis in this reply is ours unless otherwise stated.)

Final judgment in this case was rendered by the Supreme Court of Texas on March 17, 1848 (R. 98). The

petition for writ of certiorari was not filed until August 12, 1948 (R. frontspiece). This was nearly five months after the final judgment and the petition for writ of certiorari should be dismissed for failure to file within the three months period prescribed by law. *28 U. S. C. A., Sec. 350; Department of Banking v. Pink*, 317 U.S. 264, 87 L. Ed. 254.

In *Matton Steamboat Co. v. Murphy*, 319 U. S. 412, 87 L. Ed. 1483, this court said:

> "* * * The time within which such applications could be made is that prescribed by the statute. Its language is peremptory—'no appeal—shall be allowed or entertained unless application therefor be duly made within three months.' The purport of the words is that the appeal allowed must be one that is applied for within the three months period. * * *
>
> * * * * * *
>
> "We conclude that appellants' applications for allowance of the appeals, after the expiration of the three months period, were too late, and that this Court is without jurisdiction to entertain the appeals, which are accordingly dismissed." (pp. 414-5).

We are not unmindful of the fact that an application for an extension of time within which to file a petition for writ of certiorari was submitted to this Honorable Court and that the time was extended to August 14, 1948 (R. 98). We submit, however, that this application for extension of time shows on its face that the applicants acted without authority from J. Willard Gragg, the next

friend, to file such application in his behalf, *and they did not purport to file it in his behalf.*

In the first paragraph following the heading, the application for extension of time states:

> "Petitioners, Hugh Henderson, individually, and Orson Lee, next friend, for themselves and for J. Willard Gragg, next friend, respectfully pray for an extension of time of sixty days within which to file a petition for a writ of certiorari to review the final decision and judgment of the Supreme Court of the State of Texas, which is the highest court of said State, having jurisdiction over this case. * * * "

From the above quotation it is obvious that J. Willard Gragg was not applying for an extension of time, but rather that Hugh Henderson, individually, and Orson Lee, as Next Friend for the Next Friend, asked for the extension of time. This language was not inadvertently used, as evidenced by the further statement in the second paragraph of this application that "petitioners", as the term is used in the application, refers to "Petitioners, Hugh Henderson, individually, and Orson Lee, Next Friend (who will for convenience be hereinafter referred to as 'petitioners') ***." It was not claimed that J. Willard Gragg, Hugh Henderson's next friend, was one of the petitioners. It therefore follows that every statement made in this application, including the prayer for an extension of time, was made for and on behalf of "petitioners", to-wit: "Hugh Henderson, individually, and Orson Lee,

Next Friend". The fourth paragraph on page 2 of the application reads as follows:

> "Petitioners further state that through his original attorneys, John H. Haley, of Bowling Green, Missouri, and George W. Anderson of McDonald & Anderson of Wichita Fall, Texas, appearing for him and for his chosen next friend, Orson Lee, he did attempt to persuade the attorneys representing J. Willard Gragg, next friend appointed by the District Court of Clay Cou.:y, Texas, to prosecute an application for certiorari to this, the Supreme Court of the United States. But petitioner states that *no final decision was given by said next friend* and his attorneys until petitioner's chosen counsel was informed on April 9, 1948, by letter, of said date, which did not reach his counsel in Missouri until April 12, 1948, *that they have so far declined to go further in the matter*, but they would have no objection to petitioner Henderson proceeding therein in his own behalf and with his chosen attorneys; but petitioners are hopeful that said counsel will continue to prosecute for the cause and join herein in the event this application for Extension of Time is granted." (Emphasis supplied)

It will be noted from the above quoted paragraph of the application that J. Willard Gragg, Hugh Henderson's next friend appointed by the court below, and the next friend's attorneys did not deem it advisable to file an application for writ of certiorari in this court and had failed to do so prior to the expiration of the three months period. It further appears from this paragraph that petitioners were hopeful that if the extension was obtained

they would be able to convince the next friend and his attorneys that an application for writ of certiorari should be filed. We respectfully submit that the application for extension of time shows on its face that the attorneys who filed it did not represent or purport to represent J. Willard Gragg, Hugh Henderson's next friend. The extension of time was not, therefore, effective as to J. Willard Gragg, the next friend, and this court is without jurisdiction to consider the petition for certiorari filed by him more than three months after the final judgment, and the petition should be dismissed as to him.

POINT II.

HUGH HENDERSON, BEING INSANE, CANNOT APPEAR INDIVIDUALLY OR APPOINT ATTORNEYS TO APPEAR IN HIS BEHALF.

The petition for writ of certiorari purports to have been filed on behalf of Hugh Henderson individually. Likewise, as shown above, the application for extension of time within which to file such petition recites that it was filed on behalf of Hugh Henderson individually. Hugh Henderson is a person of unsound mind. The original application for certiorari from district court to county court alleged that he had been a person of unsound mind for more than 30 years (R. 2). This petition was filed by Orson H. Lee as next friend and by Hugh Henderson individually (R. 1). Pursuant to a motion filed by M. L.

Henderson, the then guardian (R. 8), the District Court of Clay County, Texas, found that Hugh Henderson was a person of unsound mind and therefore could not prosecute this action individually or employ attorneys to prosecute it for him. In this connection the court found:

> "The court finds, adjudges and decrees that the said Hugh Henderson is now and has been at all times material to this controversy a person of unsound mind and is without sufficient mental capacity to manage his own affairs, (fol. 78) and he has not now, and did not have at the time of the institution of this suit, sufficient mental capacity to determine whether it was to his best interest to institute and prosecute this proceeding, and, that he has not now and did not have sufficient mental capacity to prosecute this proceeding and that he has not now, and has not had during the times material to this controversy sufficient mental capacity to employ attorneys for the prosecution of this proceeding. It is accordingly adjudged and decreed that the Hon. C. C. McDonald and Hon. Geo. W. Anderson, who compose the law firm of McDonald & Anderson, had no authority to institute and have no authority to prosecute this proceeding as attorneys for Hugh Henderson." (R. 9, 10)

This order was appealed to the Court of Civil Appeals where it was affirmed, Henderson, et al, vs. Shell Oil Co., Inc., et al, 179 S. W. (2d) 386, and to the Supreme Court of Texas, which held it was not an appealable order, Henderson, et al, vs. Shell Oil Co., Inc., et al, 143 Tex. 142, 182 S. W. (2d) 994. Likewise the judgment now on appeal

found that Hugh Henderson was a person of unsound mind (R. 36, 38). That finding of fact was not attacked in the state courts and is not being attacked in this court.

Being a person of unsound mind, Hugh Henderson could not authorize the attorneys who purport to represent him individually to appear for him in this case either for the purpose of filing a petition for writ of certiorari or to secure an extension of time within which to file such petition. *McLean v. Burkinshaw* (Ct. of App., D. C.), 107 Fed. (2d) 665, 71 App. D. C. 107 (certiorari denied 309 U.S. 670, 84 L. Ed. 1016, 60 Sup. Ct. 616). That case involved proceedings concerning the insanity of McLean, wherein George B. Fraser filed an answer as attorney for McLean. On motion of the ancillary committee of the person and estate of McLean, the answer was stricken on the ground that Fraser had no authority to represent McLean, since he was a person of unsound mind. In affirming the action of the trial court, the Court of Appeals, in referring to McLean, said:

> "If he is insane, his insanity has ended any authority which he may ever have given to Fraser." (2. C. 665 Fed.)

The court further found that "Fraser's lack of authority appears on the face of the record."

Sullivan vs. Dunne, 198 Cal. 183 (Sup. Court of Calif.) was a petition for mandamus filed in the Supreme Court to require the trial court to approve the record so that peti-

tioner could appeal from an order appointing the guardian for an incompetent. The children of Sullivan had filed an application for guardianship over him. One Troy, an attorney, filed pleadings resisting the application. A hearing was had in the trial court and that court found that Troy had no authority to represent Sullivan and struck his pleadings. Later on after the guardianship appointment was made Troy filed on behalf of Sullivan a notice of appeal and then sought to require the chancellor to approve the record. It was held that the determination of the authority of the attorney and the mental capacity of Sullivan was for the trial court; that where an attorney is not authorized his assumed client can base no rights on his acts; that the claim of the attorney to represent the client in another case is of no moment as authority in one suit is no evidence of authority in another; that if authority had been given when Sullivan was of sound mind it would cease on his becoming of unsound mind; that the attorney could not urge the right to represent Sullivan as an amicus curiae; that the acts of the attorney in filing notice of appeal and preparing the record were ineffectual; and that the attorney in his individual capacity had no power to appeal such judgment.

And in the connected case of In re: *Sullivan*, 198 Cal. 183 (Sup Court of Calif.) the appeal so perfected by the attorney was held to be void and was dismissed.

These cases are directly in point. Hugh Henderson was a person of unsound mind and had been for more than

30 years. He could not authorize any attorney to appear in his behalf and the lack of authority of the attorneys filing the application for extension of time to represent Hugh Henderson *individually* appears on the face of the record.

This court has power at any stage of a case to require an attorney, one of its officers, to show his authority to appear. *Pueblo of Santa Rosa v. Fall*, 273 U. S. 315, 47 Sup. Ct. 361, 71 L. ed. 658. In that case this court said:

> "The question as to the authority of counsel was raised by motion to dismiss filed with answer. There was a hearing upon the motion, but the trial court of its own accord postponed a decision upon it until final hearing on the merits, an order clearly within its discretion. Whether, as a a matter of practice, the challenge to the authority of counsel was seasonably interposed, it is not important to decide, for in any event, the trial court, or *this court, has power, at any stage of the case, to require an attorney, one of its officers to show his authority to appear.* * * *" (P. 319)

We do not intend to cast any reflections upon the attorneys who applied for the extension of time within which to file the petition for writ of certiorari. They did not misstate their case. They did not purport to act on behalf of Willard Gragg, but rather on behalf of Hugh Henderson *individually* and Orson Lee as his next friend, but we submit that as a matter of law, for the reasons set out above, Hugh Henderson could not authorize them

to represent him individually and, as we shall hereafter show, Orson Lee has no standing in this case. On the other hand, this court at the time it granted the extension did not have before it the record in this case, which conclusively shows Hugh Henderson's insanity and also the removal of Orson Lee as next friend and the appointment of J. Willard Gragg in his stead.

The petition for writ of certiorari should be dismissed in so far as Hugh Henderson individually is concerned, since a petition filed by attorneys without authority is a mere nullity and Hugh Henderson, being insane, could not authorize attorneys to appear for him individually.

POINT III.

THE OBTAINING OF AN EXTENSION OF TIME WITHIN WHICH TO FILE A PETITION FOR WRIT OF CERTIORARI BY A PARTY NOT OF RECORD IN THE COURTS BELOW DOES NOT EXTEND THE TIME WITHIN WHICH THE NEXT FRIEND COULD FILE HIS PETITION.

The application for extension of time within which to file a petition for writ of certiorari was not only in the name of Hugh Henderson individually, but also in the name of Orson H. Lee, who purported to appear as next friend for Hugh Henderson. Petitioner's application for certiorari from District Court to County Court, as original-

ly filed in the District Court of Clay County, Texas, was filed by Orson H. Lee as next friend of Hugh Henderson (R. 1). Thereafter, on August 21, 1943, M. L. Henderson, the then guardian of Hugh Henderson's Texas estate and during his lifetime one of the defendants in this action, filed a motion in the District Court attacking Orson Lee's right to represent Hugh Henderson as next friend on the ground he was a mere interloper and not interested in the welfare of Hugh Henderson (R. 8). A hearing was had on this motion and, on October 22, 1943, the District Court of Clay County, Texas, in removing Orson H. Lee as next friend and appointing J. Willard Gragg in his stead, said:

> "The court further finds, adjudges and decrees that the said Orson H. Lee is not related to Hugh Henderson by blood or marriage, and is not a friend of the said Hugh Henderson, and has no interest in his welfare, and that he is an utter stranger to the next of kin and other relatives of the said Hugh Henderson, and that he is not a suitable and is not a proper person to act herein as next friend of the said Hugh Henderson, and that he has no other legal capacity to maintain this proceeding. It is, therefore, further ordered, adjudged and decreed that the said Orson H. Lee be and he is hereby removed as next friend of the said Hugh Henderson and he will not be permitted to conduct this litigation on behalf of the said Hugh Henderson." (R. 9, 10-11)

At all times subsequent to October 22, 1943, J. Willard Gragg and not Orson H. Lee has acted as next friend of Hugh Henderson. (R. 34).

Orson H. Lee was not a party to the trial in the District Court of Clay County, Texas, either individually or as next friend of Hugh Henderson. (R. 33-4). Neither was he a party in the Court of Civil Appeals nor in the Supreme Court of Texas, and it will be noted from the petition for writ of certiorari that he is not even a party in this court. He had no connection with this case in the appellate courts of Texas and his only connection with the present case in this court was to request an extension of time within which to file a petition for writ of certiorari. This brings us to the question of whether Orson Lee, a stranger to this action, may obtain a valid extension of time within which to file a petition for a writ of certiorari.

A similar question was before the Supreme Court of California in *Title Ins. & Trust Co. v. California Development Co., et al.*, 168 Cal. 397, 143 P. 723. The notice of appeal in that case was signed by certain attorneys who, while acting in good faith, were in fact without the authority which they believed they had and which they assumed to exercise. After the time for appeal had expired the company ratified the unauthorized action of these attorneys. In holding that the ratification was ineffective and that the appeal was not taken in time, the Court said:

> "* * * The filing of the notice of appeal by the attorneys was not the act of the California Development Company, and that corporation, therefore, did not take an appeal within the time limited by law. The resolution of ratification cannot alter the situation. * * * With the lapse of six months from the

> entry of the judgment, the judgment became final as against all parties who had not appealed. No appeal had then been taken by California Development Company. The right of the successful parties to maintain the judgment against it could not be taken away by a subsequent ratification. To hold the contrary would amount to allowing this defendant to take an appeal nine months after the entry of judgment, whereas the statute clearly limits the right to six months. This court has no jurisdiction of an appeal taken too late, and the jurisdiction, once gone, cannot be revived by any act done after the expiration of the time limited. The purported appeal of the California Development Company cannot therefore stand." (2. c. 724-1. c. 725)

In *Forrest vs. Hawkins*, 169 Va. 470 (Sup. Court of Va.) there was a motion to dismiss the appeal. The statute provided that a writ of error bond should be given within six months after judgment and that the bond should be signed by the principal under seal or by some one else having authority from the principal under seal. A bond was filed within the six months period but it was signed by appellant's attorney signing appellant's name and there was no authority under seal. After the expiration of the six months the appellant Forrest sought under seal to ratify this bond. It was held that it could not be done. The Court said:

> "The same principle applies here. Forrest was powerless, after the expiration of time for perfecting the writ of error, to cure the defect by ratifying the unauthorized act of the agent. It is well

> settled that his ratification will not relate back so as to impair or defeat the rights of third parties which have intervened between the time of the doing of the unauthorized act and its ratification. 2 Am. Jur. Agency, Sec. 211, p. 168; 2 C.J.S. Agency, Sec. 65, p. 1144."

The writ of error was dismissed.

The notice of appeal in the Califorina case was a necessary prerequisite to the jurisdiction of the Supreme Court of that state just as the extension time in the case at bar is necessary prerequisite to the jurisdiction of this Court, and we submit that, as was stated by the Supreme Court of California, "this Court has no jurisdiction of an appeal taken too late and the jurisdiction, once gone, cannot be revived by any act done after the expiration of the time limited." And as held by the Supreme Court of Virginia, the appellant is powerless after the expiration of the time for perfecting a writ of error to cure the defect by ratification. It, therefore, follows that even if the act of J. Willard Gragg, the next friend, in filing his petition for certiorari be considered as a ratification of Orson Lee's application for an extension of time, such ratification cannot alter the situation.

That a ratification cannot relate back so as to defeat the intervening rights of third parties is estabilised in this Court.

Cook vs. Tullis, 85 U. S. 332 (21 L. Ed. 933) involved the validity of the ratification by the owner of the act

of his bank in withdrawing the owner's bonds and substituting a promissory note owned by the banker. The Court held that the rights of third parties were not prejudiced in that case but in speaking of ratification said:

> "The general rule as to the effect of a ratification by one of the unauthorized act of another respecting the property of the former, is well settled. The ratification operates upon the act ratified precisely as though authority to do the act had been previously given, except where the rights of third parcisely as though authority to do the act had been ties have intervened between the act and the ratification. The retroactive efficacy of the ratification is subject to this qualification. The intervening rights of third persons cannot be defeated by the ratification. In other words, it is essential that the party ratifying should be able not merely to do the act ratified at the time the act was done, but also at the time the ratification was made."

Such is also the law of Texas. *Texas Moline Plow Co. vs. Clapproth*, 209 SW 392, Comm. of Apps.—holdings approved by Texas Supreme Court.

Orson Lee was not a party in the courts below either individually or as next friend of Hugh Henderson, and, as was stated by Mr. Chief Justice Tanney, in *Payne v. Niles*, 20 How. 219, 15 L. ed. 895:

> "Writs of error to remove the judgment of an inferior tribunal to this court are, under the Act of Congress, governed by the principles and usages of the common law. And it is very well settled in all common law courts, that no one can bring up, as plaintiff in a writ of error, the judgment of an

inferior court to a superior one, unless he was a party to the judgment in the court below; * * * Payne & Harrison, therefore, have no right to sue out a writ of error upon the judgment in the suit between Niles & Co. and Knox, to which they were not a party, * * *

"This writ of error attempts to do both, and is therefore not warranted by law.

"It cannot bring the judgments referred to, or either of them, before this court, and must, therefore, be dismissed with costs." (p. 221).

We also refer the Court to *Bayard vs. Lombard*, 50 U. S. 530, 13 L. ed. 245.

This question was also before this court in *Ex Parte Dorr*, 3. How. 103, 11 L. ed. 514, where it was held that an application for writ of error to review a conviction in a state court cannot be granted wherein it is prayed for without the authority of the prisioner, but at the request of his friends, although personal access to the prisoner to ascertain whether he desired such writ had been refused. In the opinion this court said:

"The counsel in this application prays for a writ of error, but as it appears from his own admission that he does not act under the authority of Dorr, but at the request of his friends, the prayer cannot be granted. In the view it is unnecessary to decide whether the counsel has stated a case, which, with the authority of his client, entitles him to a writ of error." (pp. 105-6).

In Texas it is held that amicus curiae cannot effectively give notice of appeal. *Greathouse vs. Fort Worth &*

Denver City Ry. Co., 65 SW (2) 762, Com. of Apps.—holdings approved by the Supreme Court of Texas. Also *Southern Ry. Co. vs. Locke*, 84 SW 1069, Tex. Civ. Apps.

In closing this point we respectfully submit that Orson H. Lee was a stranger to this action in the Texas courts and that as such stranger the extension of time obtained by him is a mere nullity.

We submit:—

First: That Hugh Henderson, being insane, may not appear personally in this case or employ counsel to appear in his behalf, and the extension of time within which to file a petition for writ of certiorari is a mere nullity in so far as it purports to be filed by attorneys selected by this insane person;

Second: That Orson H. Lee is a stranger to this action and a stranger may not file a petition for writ of certiorari or secure an extension of time within which to file such petition; and

Third: That the only petitioner who was a party in the appellate courts of Texas was J. Willard Gragg, next friend of Hugh Henderson. He was the only person authorized to represent Hugh Henderson. He was the only person who could apply to this court for a writ of certiorari. Likewise, he was the only person who could apply for an extension of time within which to file his petition for certiorari.

REPLY TO THE MERITS:

This Respondent believes that the court has not acquired jurisdiction to issue the writ because of the matters heretofore discussed. If Respondent be mistaken in this, then he submits the following brief reply on the merits:

ANSWER TO PETITIONER'S SPECIFICATION OF ERROR A.

(a) Contrary to petitioner's contention in specification of Error A (Brief 17), this court held, in *Chaloner v. Sherman*, 242 U.S. 455, 61 L. ed. 427, and the Supreme Court of Texas held in the case at bar (R. 89, 91-92), that statutes permitting the appointment of guardians of nonresident persons of unsound mind who had not theretofore been adjudicated incompetent do not violate the Federal Constitution. These cases are a complete answer to Petitioner's Specification of Error A.

(b) The District Court found that Hugh Henderson was adjudicated insane by a Missouri court of competent jurisdiction on March 6, 1908 (R. 35) and there is no evidence of his restoration to sanity. Therefore, no Federal question is even raised by the facts.

ANSWER TO PETITIONER'S SPECIFICATION OF ERROR B.

(a) Contrary to petitioner's contention in Specification of Error B (Brief 17), this court held in *Jones v.*

Prairie Oil & Gas Co., 273 U. S. 195, 71 L. ed. 602, and in *Cunnius v. Reading School District*, 198 U. S. 458, 49 L. ed. 1125, that the appointment of a guardian of the estate on constructive notices does not violate the Federal Constitution, although the contention was made in the Cunnius case that there must be a prior seizure of the property. The filing of the petition for the appointment of a guardian gave the County Court of Clay County jurisdiction over Hugh Henderson's Texas estate. *Wootters v. Wynne* (Civ. App. Tex.), 7 SW (2d) 940 (no writ).

(b) Hugh Henderson personally appeared in the County Court (R. 60) and also in the District Court (R.37). These personal appearances made personal service unnecessary. *12 C.J. 1233.* Therefore, the question of whether personal service is necessary is not even raised by the facts.

ANSWER TO PETITIONER'S SPECIFICATION OF ERROR C.

(a) Contrary to petitioner's contention in Specification of Error C (Brief 17), this court held in *Jones v. Prairie Oil & Gas Co.*, 273 U. S. 195, 71 L. ed. 602, supra, and in *Cunnius v. Reading School District*, 198, U. S. 458, 49. L. ed. 1125, supra, that personal service is not necessary to appoint a guardian of the estate and the Supreme Court of Texas so held in the case at bar (R. 92).

(b) As shown above, petitioner's personal appearance in the County Court (R. 60) as well as his appearance in the District Court by invoking its jurisdiction (R. 37) was equivalent to personal service of process, if that be required.

ANSWER TO PETITIONER'S SPECIFICATION OF ERROR D.

(a) This specification of error (Brief 17) is a reiteration of Specification of Error C in so far as personal service is required. The Supreme Court of Texas held in the case at bar that under the laws of that state a proceeding for the appointment of a guardian is an action in rem or quasi in rem (R. 92), and this court held to the same effect in *Jones v. Prairie Oil & Gas Co.*, 273 U. S. 195, 71 L. ed. 602, supra, and in *Cunnius v. Reading School District*, 198 U. S. 458, 49 L. ed. 1125, supra.

(b) While, as pointed out in the brief of respondent Shell, a guardianship proceeding is in rem, that question is not material here, since petitioner's personal appearance in the County Court (R. 60) and also his legal appearance in the Distirct Court (R. 37) was sufficient even in a proceeding in personam. *12 C.J. 1233.*

We respectflly submit that J. Willard Gragg, the next friend appointed by the court, having failed to file his petition for writ of certiorari within the three months period prescribed by law and having failed to obtain an

extension of time within which to file such petition, this court is without jurisdiction and the petition for writ of certiorari should be dismssed. We further submit that even if the petition shoud be considered that the same is without merit and the writ should not be granted.

RESPECTFULLY SUBMITTED,

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No. 218

In the Supreme Court of the United States

October Term, 1948.

UGH HENDERSON, BY J. WILLARD GRAGG, NEXT FRIEND, *Petitioner,*

vs.

SHELL OIL COMPANY, INC., *ET AL., Respondents.*

SUPPLEMENTAL BRIEF OF SHELL OIL COMPANY, INCORPORATED, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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May It Please the Court:

Our only excuse for burdening this Court with a supplemental brief is the fact that while the case at bar was pending in the Supreme Court of Texas the Supreme Court of Iowa overruled the case upon which petitioner so strongly relies. *Raher* v. *Raher,* 150 Ia. 511, 129 N. W. 494, is discussed at length at pages 23-24 of petitioner's original brief. In that case the Supreme Court of Iowa held that under the Iowa statutes an action for the appointment of a guardian for a *resident* was an action *in personam* and personal service was necessary. Petitioner contended at page 35 of his original brief that the *Raher* case was at variance with *Wallace* v. *Tinney,* 145 Ia. 478, 122 N. W. 936, discussed at pages 27-28 of our former brief, wherein the Supreme Court of Iowa held that an action for the appointment of a guard-

ian of the estate of a *nonresident* person of unsound mind was an action *in rem* and personal service was not necessary. While, as shown in our former brief, the *Raher* case is distinguishable from the case at bar, even the specious argument made by petitioner in reliance on the *Raher* case is silenced by *Edwards* v. *Smith*, 29 N. W. (2d) 404 (not officially reported), wherein the Supreme Court of Iowa, in expressly overruling *Raher* v. *Raher, supra*, said:

> "Since the Iowa decisions are inconclusive we must weigh the *Raher* opinion with other scales. The initial premise upon which it rests—and must rest—seems to us unsound. *Proceedings for the appointment of guardians of property of alleged incompetents, resident or nonresident, are at least quasi in rem.* Care and conservation of the property is the primary purpose. The mental condition of the owner is incidental. An adjudication of incompetency is solely for the purpose of conserving the property in the owner's interest. • • • (2 c. 406)
>
> "• • • However, these are thoughts we need not pursue in the instant case. We hold a judgment appointing guardian of a ward's property in Iowa is *in rem* and properly based upon personal service outside the state. The decision in *Raher* v. *Raher* must be overruled." (2 c. 406)

Like other courts that have passed upon the question, the Supreme Court of Iowa now holds that an action for the appointment of a guardian *of the estate* of a person of unsound mind is an action *in rem* regardless of whether the incompetent be a resident or a nonresident and that *constructive notice is sufficient in either case.*

In pointing out the errors which appear in petitioner's reply brief we shall follow the same order and use the same numbers as petitioner did in his summary of argument.

I.

Petitioner contends on page 4 of his reply brief that a part of our argument is based on the premise that Hugh Henderson is insane. We submit that the question of Hugh Henderson's insanity was not controverted in the District Court or in the appellate courts of Texas and that such insanity is not being questioned in this Court. If there is anything that has been certain from the beginning of this case it is that Hugh Henderson is and has been for many years a person of unsound mind. Petitioner's original application for certiorari to the District Court, purporting to have been filed by "Hugh Henderson, individually" and by his next friend, alleged that Hugh Henderson "is now and has been for more than 30 years a person of unsound mind" (R. 2); his second supplemental petition filed by J. Willard Gragg, his present next friend, stated, "Hugh Henderson has been and is now under disability of a person *non compos mentis*" (R. 31); the District Court, after hearing evidence on the question at the time J. Willard Gragg was appointed next friend, found that "Hugh Henderson is now and has been at all times material to this controversy a person of unsound mind" (R. 10); and in the judgment appealed from herein the District Court likewise found Hugh Henderson was a person of unsound mind (R. 33-38). The finding of fact regarding Hugh Henderson's insanity was not attacked in the appellate courts of Texas and it is not questioned in the petition for writ of certiorari filed in this Court. The fact that petitioner pleaded and proved his insanity was not mere inadvertence. It was necessary in order to establish the jurisdiction of the District Court, since Article 932, Rev. Civ. Stats 1925, provides that certiorari to the District Court shall be brought within two years

"and not afterwards," except that persons *non compos mentis* shall have two years after the removal of their disability within which to bring such action. The 1918 order appointing a guardian for Hugh Henderson's Texas estate (R. 53) was made 25 years before this action was filed in the District Court (R. 2) and the 1939 order (R. 60) was made four years prior thereto. Consequently, it was necessary for petitioner to allege and prove insanity in order to escape the effect of this two-year statute. He may not now contend that he is in fact sane.

II.

On page 5 of his reply brief petitioner accuses this respondent of telling a falsehood and untruth. He asserts that we stated Hugh Henderson had been adjudicated insane by a Missouri court. What we actually said was—"The District Court found that on March 6, 1908, while a resident of Pike County, Missouri, Hugh Henderson was duly adjudicated to be a person of unsound mind and that thereafter he spent twelve years in an insane asylum at Fulton, Missouri." (Brief 5) If this statement is "false and untrue," as asserted by petitioner, then the transcript of the record prepared by him and filed in this Court likewise is false and untrue, since that statement was taken from the record. The record states as follows:

> "• • • In connection with that specific attack this court finds that on March 6, 1908, Hugh Henderson was a resident citizen domiciled in Pike County, Missouri, and on that date he was duly adjudicated to be a person of unsound mind by a court of competent jurisdiction in Pike County, Missouri; that thereafter on the 7th day of March, 1908, the said Hugh Henderson was transported to Fulton, Missouri, and there confined in the State Institution for the Insane at Fulton, Missouri,

continuously from March 7, 1908, until August 4, 1920, at which time he escaped from said institution and since which time he has not been confined therein * * *." (R. 35)

This finding of the District Court has not been attacked in petitioner's application for writ of certiorari to this Court.

III.

Pages 6 and 7 and a part of page 8 of petitioner's reply brief are given over to the argument that the notice served on Hugh Henderson in Missouri was not provided for by statute. We so conceded in our original brief at page 10, wherein we stated:

"* * * Likewise, Hugh Henderson was personally served in Missouri, *although such personal service was not required by the statute.*" (Emphasis supplied.)

The statutory notice given in 1939 was by posting (R. 57-58). *The Supreme Court of Texas held that the posting notice was sufficient* (R. 92). It was constructive in its nature. Likewise, personal out of state notice, even when required by statute, is only constructive in its effect. Thus it will be seen that *the notice given in this case exceeded that required by the statute.* Not only was the statutory posting notice given, but an additional unnecessary personal notice was served on Hugh Henderson in Missouri, and it was by reason of this unnecessary personal notice that he was afforded an opportunity to come to Texas and to be present in the courtroom at the time a guardian for his Texas estate was appointed in 1939.

IV.

Petitioner asserts on page 8 of his reply brief that Hugh Henderson's physical presence in the courtroom did not constitute an appearance. This is another question that petitioner did not raise by his petition for certiorari in this Court. The County Court order appointing the guardian of his estate states, "*and came also Hugh Henderson in person.*" (R. 60) Petitioner does not attack this finding in his application for writ of certiorari, nor did he request that the evidence upon which it was based be placed in the transcript of the record. This finding of the court is therefore binding upon him. The jurisdiction of the District Court is discussed at pages 7-8 of our former brief.

V.

Petitioner's contention that there was no prior seizure is fully answered by *Wootters* v. *Wynne,* (Civ. App. Tex.) 7 S. W. (2d) 940 (no writ), discussed at pages 23-24 of our answer brief, wherein it was held that the County Court acquired jurisdiction of petitioner's estate upon the filing of the application for the appointment of a guardian. The same contention was overruled by this Court in *Cunnius* v. *Reading School District,* 198 U. S. 458, 49 L. ed. 1125.

VI.

At page 10 of his reply brief petitioner chides us for discussing questions other than the merits of this case. We submit that in his reply brief there is not a single case cited which discusses the merits of the case. In spite of the fact that, as he states, our brief contains a large number of citations, he has not taken issue with a single authority cited by us, nor has he attempted to point to any errors in our discussion of his authorities. It is therefore reasonable to

assume that petitioner agrees with our statement of what the authorities cited by us hold, as well as with our statement of the distinguishing characteristics in the authorities cited by him. Of the many cases cited by us, the only one which petitioner attempts to distinguish is *Chaloner* v. *Sherman,* 242 U. S. 455, 61 L. ed. 427, and he does not contend that case is not an authority for the point under which we cited it. Petitioner's Specification of Error A (Orig. br. 17) was that the courts of Texas were without jurisdiction to determine the insanity of a nonresident. We cited the *Chaloner* case as holding to the contrary. On page 10 of our brief we conceded that the *Chaloner* case did not discuss the question of whether constructive service is sufficient in a guardianship proceeding. On the other hand, commencing on page 11 of our brief, we cited two cases from England, twenty-five cases from the state appellate courts, and three cases from this Court (*Jones* v. *Prairie Oil and Gas Co.,* 273 U. S. 195, 71 L. ed. 602; *Cunnius* v. *Reading School District,* 198 U. S. 458, 49 L. ed. 1125; and *Blinn* v. *Nelson,* 222 U. S. 1, 56 L. ed. 65), all of which hold that under proper statutory provision a guardian of the estate may be appointed on constructive notice. No attempt was made to distinguish or even discuss any of these cases.

VII.

Petitioner asserts on page 3 of his reply brief that the confusion regarding "due process" is manifested and demonstrated by the number of citations in our briefs. This is indeed an unique argument since there is no conflict in the cases. We cite thirty cases to the effect that under proper statutory authority a *guardian of the estate* may be appointed upon constructive notice. Petitioner cites only one case to the contrary (*Redmon* v. *Leach* (Civ. App. Dallas),

130 S. W. (2d) 873) and that case was repudiated by the Supreme Court of Texas in the case at bar.

The petition for writ of certiorari should be denied.

Respectfully submitted,

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